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In The

Supreme Court of the United States

October Term, 1993

CITY OF TIMBER LAKE, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF ISABEL, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF DUPREE, A SOUTH DAKOTA MUNICIPAL CORPORATION; DUPREE AMERICAN LEGION CLUB, EDWIN HODGES POST 124; AND MICKI HUTCHINSON, DOING BUSINESS AS MICKI'S CAFE & LOUNGE,

Petitioners,

v.

CHEYENNE RIVER SIOUX TRIBE; GREGG J. BOURLAND, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE; MARVIN LECOMPTE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CHEYENNE RIVER SIOUX TRIBE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY MICHAEL ENGEL*
MAY, ADAM, GERDES & THOMPSON
P.O. Box 160
Pierre, SD 57501-0160
Telephone: (605) 224-8803

KENNETH E. BARKER
QUINN, EIESLAND, DAY & BARKER
P.O. Box 370
Belle Fourche, SD 57717
Telephone: (605) 892-2743
Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER IN 1953 CONGRESS DELEGATED POWER TO TRIBES AND TRIBAL COURTS TO REGULATE THE SALE OF LIQUOR BY NON-MEMBERS ON FEE LANDS IN "NON-INDIAN COMMUNITIES" ON RESERVATIONS BY PASSAGE OF 18 U.S.C. § 1161?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 29, 1993.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals appears at 10 F.3d 554 (8th Cir. 1993) and is printed in the Appendix at A-1. The Petition for Rehearing and Suggestion for Rehearing En Banc were denied January 11, 1994. Appendix at A-93. The opinion of the District Court is unreported and is printed in the Appendix at A-12. The opinion of the Tribal Court of Appeals is printed in the Appendix at A-28. The memorandum opinion of the Tribal Trial Court appears in the Appendix at A-52.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on November 29, 1993. A-1. The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 11, 1994. A-93. The Honorable Harry A. Blackmun subsequently entered an order extending the time for submitting the petition for writ of certiorari to May 2, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS

18 U.S.C. § 1151. Appendix at A-94.

18 U.S.C. § 1154. Appendix at A-94.

18 U.S.C. § 1156. Appendix at A-96.

18 U.S.C. § 1161. Appendix at A-96.

STATEMENT OF THE CASE

This case raises the issue whether in 1953 Congress expressly delegated to Indian tribes the power to regulate non-members engaged in the liquor business both on fee-patented land in "non-Indian communities" and on rights-of-way through reservations.[1]

A. Statutory Background.

Prior to 1948, Congress forbade (1) the introduction of liquor into Indian country and (2) the possession of liquor anywhere in the United States by an Indian who was a ward of the government. *See* 12 Stat. 338, 339 (1862). In 1948, Congress adopted a broad definition of "Indian country" which included "all lands within the limits of any Indian reservation." 18 U.S.C. § 1151. The then-existing liquor statutes, 18 U.S.C. §§ 1154 and 1156, were therefore subject to the broad "Indian country" definition and introduction of liquor into "Indian country" so defined was punishable as a violation of federal law.

In 1949, however, the definition of "Indian country" was narrowed with regard to federal Indian liquor law. Both 18 U.S.C. § 1154 and 18 U.S.C. § 1156 were amended to exclude from the definition of "Indian country," as

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[1] While this litigation only explicitly raises the issue of tribal jurisdiction over non-Indian communities, the decision of the Court of Appeals also necessarily vests in tribes jurisdiction over rights-of-way through reservations. This is a development which promises substantial disruption of commerce across reservations involving alcohol, whether by the closure of rights-of-way, seizure of alcohol and transports as contraband, or otherwise. *See* argument at pp. 28 to 30, *infra*; Appendix at A-112, A-124 to A-125, A-132.

used in those sections, "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations." 18 U.S.C. § 1154(c); 18 U.S.C. § 1156. The Historical and Revision Notes to § 1154 explain that language had been added to § 1154 and § 1156 to make them "conform . . . more closely to the laws relating to intoxicating liquor in the Indian country as they have heretofore been construed."

Accordingly, after 1949, the Department of the Interior applied the "Indian country" definition that excluded non-Indian communities and rights-of-ways on reservations. On September 28, 1951, Acting Solicitor Flannery of the Department of the Interior stated:

> It follows that any fee-patented land adjacent to a non-Indian community on which a [liquor] business is operated which serves the needs of that community should not be regarded as "Indian country" within the meaning of section 1154 of the criminal code.

"Fee-patented land within reservation boundaries-sale of beer to non-Indians, September 28, 1951," *reprinted at* II Opinions of the Solicitor 1555, 1556. Solicitor Flannery also commented that

> [t]his view is also clearly required by the legislative history of this definition of Indian country. Prior to the revision of the Federal criminal code in 1948, it was settled by a long line of judicial decisions that when Indian title to lands had been extinguished such lands were no longer to

> be regarded as Indian country within the intendment of Indian liquor laws.

Id.[2]

In 1953, 18 U.S.C. § 1161 was enacted. A-96. The operative language of that section provided that §§ 1154 and 1156 did not apply to any area that is not "Indian country." This had the effect of lifting the federal law ban on alcohol possession by Indians outside of "Indian country." Further, § 1154 and § 1156 did not thereafter apply to any area which was "Indian country" if both the state and tribe had enacted appropriate legislation, and the Secretary of the Interior had approved the tribal legislation.

The Cheyenne River Sioux Tribe, which was apparently anxious to legalize liquor, enacted an ordinance the same year as 18 U.S.C. § 1161 was adopted. *See* 18 Fed. Reg. 7479 (Nov. 21, 1953). The Tribe's 1953 ordinance

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[2] *See also*, S. Rep. 303, 81st Cong., 1st Sess. (1949); The Brief Amici of the Shoshone and Arapaho Tribes of the Wind River Reservation, Wyoming in *United States v. Mazurie*, 73-1018, at 10, explained the congressional motive as follows:

> But small towns, with predominately nonIndian populations, located on Indian reservations, complained that the statutory definition was too broad. Prior to the 1948 Act definition, establishments in such towns had been selling liquor on fee land, in reliance of the pre-1948 Act court rulings that fee land on an Indian reservation was not Indian country. The towns wanted that privilege reinstated.
>
> Congress responded by the 1949 Amendment that changed the 1948 definition of Indian country to exclude from the prohibitions of the Indian liquor laws, "fee patented land in nonIndian communities or rights-of-ways through Indian reservations. . . ."

carefully avoided asserting jurisdiction over non-Indian communities or rights-of-way, and indeed excluded all non-Indian land. It thus implicitly adopted the view that its authority was constrained by 18 U.S.C. § 1154(c). *See* 18 Fed. Reg. 7479 (Nov. 21, 1953)[3]

On March 1, 1988, however, the Tribe passed a resolution amending its 1953 ordinance and asserting jurisdiction over "all lands within the reservation boundaries." 53 Fed.Reg. 20179 (June 2, 1988). In publishing the required notice, the Assistant Secretary, Indian Affairs, confirmed Interior's earlier view and noted the potential conflict between the tribal ordinance and § 18 U.S.C. 1154(c). The notice acknowledged the continuing validity of the statutory exemptions relating to "fee patented lands in non-Indian communities or rights-of-way through reservations." *Id.*[4]

On February 7, 1991, the tribal ordinance was again revised, and again asserted jurisdiction over all lands

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[3] The scope of the tribal ordinance was limited to "[a]ny restricted Indian land, whether tribally or individually owned, contained within the original boundaries of the Cheyenne River Reservation as defined and described by the Act of March 2, 1889." *Id.*

[4] The Assistant Secretary stated:

> There is no reference to the *two exemptions* to the tribe's jurisdiction as described in 18 U.S.C. § 1154(c). *However, the existence of land entitled to either of the two exemptions, fee patented lands in non-Indian communities or rights-of-way through Indian reservations, is a factual question* to be decided by the courts. Therefore, my certification is not a decision on whether there are exemptions to the tribe's jurisdiction.

53 Fed.Reg. 20179 (Emphasis added.)

within the boundaries of the reservation. On April 24, 1992, Interior abruptly altered its prior position. Its new opinion, virtually without analysis, concluded that "we . . . believe that the tribe has authority to regulate liquor on fee land within the reservation." Memorandum from the Acting Associate Solicitor, Indian Affairs, April 24, 1992. App. A, Ex. F, Defendants' Motion for Summary Judgment.

B. The Instant Litigation.

Petitioners in this litigation are the non-Indian owners and operators of liquor establishments on fee land on the reservation.[5] After Petitioners refused to purchase tribal liquor and business licenses, the Tribe started enforcement proceedings against Petitioners in tribal court. The tribal trial court found § 1161 to be a delegation of authority with regard to fee land in non-Indian communities and rights-of-way despite federal court of appeals precedent directly to the contrary, *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980), and despite this Court's opinions in *United States v. Mazurie*, 419 U.S. 544 (1975) and *Rice v. Rehner*, 463 U.S. 713 (1983). Tribal Court

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[5] Petitioners Timber Lake, Isabel and Dupree are all South Dakota municipal corporations located within the exterior boundaries of the Cheyenne River Indian Reservation. Each city owns and operates a municipal liquor store on land held in fee simple. Petitioner Dupree American Legion Club maintains a liquor establishment and clubhouse on fee-patented land in Dupree, South Dakota. Petitioner Micki Hutchinson is a non-Indian individual operating a cafe and liquor establishment on fee-patented land in Isabel.

Opinion, A-52. The tribal court of appeals affirmed. Tribal Appeals Court Opinion, A-28.

Following contempt proceedings in tribal court, all the Petitioners except Micki Hutchinson closed voluntarily under threat of a closing by force. The Tribe eventually forcefully closed Micki Hutchinson's establishment and seized her liquor inventory. It has never been returned.

Petitioners thereupon brought suit in federal district court[6] to enjoin the Tribe and certain tribal officers from enforcing the ordinance against them. The tribal defendants, for the purpose of the preliminary injunction motion, stipulated that two of the three communities were "non-Indian communities" as defined by 18 U.S.C. §§ 1154 and 1156.[7]

Evidence was presented to the district court in support of the motions for a temporary restraining order and

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[6] The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 1343(a)(4).

[7] In *United States v. Mission Golf Course*, 548 F.Supp. 1177, 1179-80 (D.S.D. 1982) *aff'd mem.* 716 F.2d 907 (8th Cir. 1983) *cert. den.* 464 U.S. 1041 (1984), the district court listed the following "factors" to be considered when deciding whether a given locality is a "non-Indian community:"

(1) Racial composition of the population in the area, both historically and in the present, and the extent of this population's use of area services other than the liquor establishments at issue;
(2) A comparison of the roles of state, federal and tribal governments in the area;
(3) Title to land in the area; and
(4) Racial composition of the clientele of the establishment selling liquor.

preliminary injunction which establishes that all three areas are "non-Indian communities." For example, the population of Isabel, South Dakota, is 73% non-Indian.[8]

Timber Lake, Isabel, Dupree and the surrounding areas were opened for settlement pursuant to the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* As a result, the land in and around Isabel is more than 95% fee-titled.[9] *Compare* these facts and the district court opinion, A-12, *with Brendale v. Confederated Tribes*, 492 U.S. 408 (1989).

The district court granted a preliminary injunction against the tribal Defendants with regard to all four Petitioners. The district court found the Petitioner's argument relating to the "Indian country" definition "persuasive." A-19.[10]

The Eighth Circuit Court of Appeals reversed. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993); A-1. The Court of Appeals panel overruled circuit precedent directly to the contrary and found that 18 U.S.C. § 1161 constituted a delegation by Congress to the tribes of authority to regulate non-Indians engaged in

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[8] Affidavit of Paul Garr in Support of Motion for Temporary Restraining Order and Preliminary Injunction, June 17, 1992 (citing census data).

[9] Affidavit of Peggy Flynn in Support of Motion For Temporary Restraining Order and Preliminary Injunction, June 16, 1992 (statement of county tax assessor).

[10] The district court also commented that the tribal liquor ordinance was written so as to give the tribal liquor commission "broad, almost limitless discretion to grant or deny licenses in the best interests of the tribe." A-17, n.3.

the liquor business within the "four corners" of the reservation. *City of Timber Lake*, 10 F.3d at 558, A-7. The Court thus in effect held that it was irrelevant under § 1161 whether the Petitioners were operating in "non-Indian communities." *Id.*; 18 U.S.C. § 1154(c).

The Court of Appeals noted, however, that the definition of "Indian country" in §§ 1154(c) and 1156, which excludes "non-Indian communities," remains in effect as to those federal criminal statutes. Thus, according to the Court of Appeals, Congress in section 1161 delegated to the *tribes* authority over non-Indians in all "Indian country," including non-Indian communities (and by implication rights-of-way), but limited the reach of federal criminal law to regulate liquor sales in Indian country to areas *other than* non-Indian communities or rights-of-way. *City of Timber Lake*, 10 F.3d at 558, A-7.

Further, by upholding the tribal claim, the Court of Appeals effectively held that the *tribal court* had jurisdiction to enforce these regulations against non-Indians. *See id.* at 556; A-3. Earlier cases (outside of non-Indian communities) had, however, sanctioned only *federal court enforcement* of tribal regulations. *See, e.g., Duro v. Reina*, 495 U.S. 676, 694 (1990); *Rice v. Rehner*, 463 U.S. 713 (1983); *United States v. Mission Golf Course*, 548 F. Supp. 1177 (D.S.D. 1982); *aff'd mem.* 716 F.2d 907 (8th Cir. 1983), *cert. den.*, 464 U.S. 1041 (1984). *See also Mazurie, supra; United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS IN PRINCIPLE WITH *UNITED STATES V. MAZURIE* AND *RICE V. REHNER*.

United States v. Mazurie, 419 U.S. 544 (1975) and *Rice v. Rehner*, 463 U.S. 713 (1983) establish that Congress, in enacting 18 U.S.C. 1161, intended to adopt the "Indian country" limitations contained in §§ 1154 and 1156. Thus, the delegation of authority to the tribes excludes fee lands in "non-Indian communities" and rights-of-way. In contrast, the Court of Appeals found that Congress delegated to tribes authority over all of Indian country *including* non-Indian communities and rights-of-way, but at the same time found that federal jurisdiction extends to Indian country *except* in non-Indian communities and on rights-of-way. The Court of Appeals decision distorts the careful arrangement of power set out by Congress and approved by this Court.

A. *United States v. Mazurie*, establishes that 18 U.S.C. § 1161 did not delegate jurisdiction to tribes with regard to fee lands in non-Indian communities and rights-of-way on reservations.

1. *Mazurie* clearly establishes that "Indian country," for the purpose of § 1161, does not include fee lands in non-Indian communities or rights-of-way.

In *United States v. Mazurie*, 419 U.S. 544 (1975), the tribal government of the Wind River Reservation enacted a liquor ordinance requiring a tribal liquor license. A non-Indian bar owner applied for but was denied a tribal

license. The United States initiated a criminal prosecution of the non-Indian bar owner for selling liquor in violation of the tribal regulation, and he was convicted.

Argument made to this Court made clear the position both of the federal government and the tribes that the definition of "Indian country" for the purposes of federal *and* tribal liquor jurisdiction *excluded* non-Indian communities and rights-of-way. According to the Brief for the United States:

> *The rights of non-Indians within Indian country are protected by 18 U.S.C. 1154(c) which exempts rights-of-way, and fee patented lands within non-Indian communities, from the liquor prohibition, even though these exemptions may be contrary to the Tribes' wishes,* and by 18 U.S.C. 1154, which allows the Tribes to permit introduction of liquor into Indian country only if it does not violate state law.

Brief for the United States at 23, *United States v. Mazurie*, 419 U.S. 544 (1975) (No. 73-1018) (emphasis added).

Similarly, the United States also told this Court that, after a tribal license had been denied,

> [r]espondents could not lawfully continue their liquor sales operation *unless they were conducting it in a non-Indian community,* within the meaning of the exception in 18 U.S.C. 1154(c).

Id. at 13 (emphasis added).[11]

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[11] The United States further emphasized the narrow scope of the federal delegation of power under § 1161 when, in oral

The Wind River Tribes *agreed* with the position of the United States, arguing that tribal authority extended to "all parts of the reservation, *except* fee land in non-Indian communities, and *except* rights-of-way traversing the reservation." Brief Amici of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation, Wyoming, *United States v. Mazurie*, No. 73-1018, at 1 (emphasis added). *See also id.* at 5. In addition, the Brief of Amicus Curiae National Tribal Chairman's Association stated the tribe had the authority to "license anyone," Indian or non-Indian, who want to sell liquor within Indian country, whether located on patented or trust lands, but added in a footnote:

> There is one sensible exception: sales on fee patented lands in non-Indian communities.

Brief of Amicus Curiae National Tribe Chairman's Association, *United States v. Mazurie*, at 6, n.6.

Thus, the United States and the tribal litigants represented to this Court in *Mazurie* that the tribes had been delegated certain jurisdiction on Indian reservations for

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argument, Assistant Solicitor Harry Sachse referred to the fact that Congress had

> specifically granted this legislative power and has done it *in a very limited and restricted way, with full account for the interest of non-Indians.*
>
> *The very exception that is attacked for non-Indian communities recognizes and protects a non-Indian interest* here and the requirement that the regulation be approved by the Secretary of the Interior makes this a very limited delegation of authority. . . ."

Oral argument of the Assistant Solicitor, *United States v. Mazurie*, No. 73-1018 (November 12, 1974) at 14. (Emphasis added) *See also id.* at 49, 50.

the purpose of liquor control, but that the delegation did *not* extend to fee land in non-Indian communities nor rights-of-way through reservations.[12]

This Court in *Mazurie* agreed. First, the Court carefully set out the evolution of the definition of "Indian country" in the liquor context so as to exclude both fee patented lands within "non-Indian communities" and "rights-of-way through reservations." *Mazurie*, 419 U.S. at 547. *In the very same paragraph*, the Court described the reach of § 1161 as follows:

> In 1953, Congress passed local-option legislation allowing Indian tribes, with approval of the Secretary of the Interior, to regulate the introduction of liquor into *Indian country*, so long as state law was not violated. Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161.

Id. (Emphasis added). The Court thus unmistakably applied the 18 U.S.C. 1154(c) definition of Indian country to 18 U.S.C. 1161. The Court also stated:

> We note that the section 1154(c) exception is available for fee- patented lands which *are* in *non-Indian* communities, rather than those which *are not* in *Indian* communities.

Mazurie, 419 U.S. at 552, n.10 (emphasis in original).

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[12] The Solicitor General made similar statements in a post-*Rice* case. Brief of United States in Opposition [to Petition for Writ of Certiorari], *City of Mission, et al. v. United States*, at 2, No. 83-606. Given the position taken by the Solicitor in *Mazurie* and *City of Mission*, as well as his regular involvement in "Indian country" jurisprudence, it may be appropriate for the Court to seek the views of the Solicitor General.

The Court also said:

> The prosecution was required to do no more than prove that the Blue Bull *was not located in a non-Indian community*. . . .

Mazurie, 419 U.S. at 553 (emphasis added). The *Mazurie* Court thus made it quite clear that the federal delegation to tribes of the power to control liquor extended only to "Indian country" as defined by 18 U.S.C. § 1154(c), and thus *excluded* non-Indian communities and rights-of-way.

2. Mazurie also establishes that the enactment of § 1161 did not delegate power to the tribes to enforce tribal liquor regulations in tribal court.

Not only is the opinion of the Eighth Circuit flawed in that it expands the geographic scope of the delegated federal power to regulate liquor, but it is also flawed in that by ordering the action below dismissed, it permits the tribe to enforce the liquor regulation *in its own courts*.

Mazurie does not allow the tribe to exercise jurisdiction in its own courts, but rather only allows the tribe to enact an ordinance which is enforceable *in federal court*. *See Mazurie*, 419 U.S. at 545. This understanding of *Mazurie* is confirmed by *Duro v. Reina*, 495 U.S. 676, 694 (1990), in which the Court described *Mazurie* as approving a

> delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in federal court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the

> power to punish nonmembers in *tribal* court. We decline to produce such a result through recognition of inherent tribal authority. [Emphasis in original.]

The precise context of *Duro* was a criminal sanction, but the characterization of *Mazurie* is nonetheless valid. The limited congressional delegation to tribes only allows the tribe to enact an ordinance which is then enforceable in federal (not tribal) court.

Consistent with this understanding and *Rice v. Rehner*, the lower courts have found only that the *federal government* could enforce tribal regulations in *federal* court, and *no* federal court, other than here, has found that a tribal court could exercise the power ascribed to it by the Court of Appeals. *See United States v. Mission Golf Course*, 548 F. Supp. 1177 (D.S.D. 1982), *aff'd mem.*, 716 F.2d 907 (8th Cir. 1983), *cert. den.*, 464 U.S. 1041 (1984); *Berry v. Arapaho and Shoshone Tribes*, 420 F. Supp. 934 (D.Wyo. 1976); *see also United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980).

B. *Rice v. Rehner* confirms *Mazurie's* definition of Indian country for the purpose of the federal delegation of power over the liquor trade.

In *Rice* the issue was whether the state could require a tribal member to obtain a state liquor license for the sale of liquor on an Indian reservation. *Rice* confirms *Mazurie*'s understanding of the limitation of tribal authority under § 1161 to areas of "Indian country" other than "non-Indian communities" and "rights-of-way."

Both the *Rice* majority, 463 U.S. at 732, n.16, and the dissent, 463 U.S. at 741, cite to the very page at which *Mazurie* discusses the evolution of the "Indian country" definition in the liquor context to exclude "both fee patented lands within non-Indian communities" and rights-of-way through reservations. *See Mazurie*, 419 U.S. at 547. *Rice* further cites *Mazurie*'s "understanding of § 1161," again confirming *Mazurie*'s limitation of tribal authority. *Rice*, 463 U.S. at 729.[12]

Rice also refers to the "same delegation" of authority by § 1161 to the states as to the tribes. *Rice*, 463 U.S. at 731. But the states, through 18 U.S.C. 1154(c), enacted just four years earlier, already had the power to regulate liquor traffic on fee lands in non-Indian communities and on rights-of-way. Section 1161 thus did not delegate any authority to the states with regard to such non-Indian communities or rights-of-way. Because § 1161 was held in *Rice* to have delegated the "same" authority to the tribes as to the states, it follows that § 1161 did not delegate authority to the tribe with regard to non-Indian communities and rights-of-way.

C. The decision of the Court of Appeals creates an inexplicable gap between the power found to be delegated to the tribes and the power of the United States.

According to the Eighth Circuit, a non-Indian in a non-Indian community or on a right-of-way through the

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[12] The Court also noted that the Court of Appeals had held that exclusive tribal jurisdiction existed only over "members of the governing tribe." *Rice*, 463 U.S. at 715, n.2.

reservation *is* subject to *tribal jurisdiction*. The Circuit Court also found that a non-Indian on fee land in a non-Indian community or on a right-of-way is *not* subject to *federal jurisdiction*:

> By the express terms of §§ 1154(c), 1156, and 1151, the narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition of § 1151 applies to all other sections in the chapter, like § 1161.

City of Timber Lake, 10 F.3d at 558. A-7.

Thus, the Eighth Circuit has declared that, with regard to the most controversial and hotly contested areas on reservations – non-Indian communities and rights-of-way – the *federal government has no power but instead delegated all of its available power to the tribe.*

Such a conclusion is illogical. First, it is contrary to the repeated conclusion in *Rice* that the federal government has "long ago . . . divested [the tribes] of any inherent self-government over liquor regulation. . . . " *Rice*, 463 U.S. at 726; *see also* 463 U.S. at 724, 731, n.15.

Second, the result reached here creates a new level of jurisdictional absurdity. Under the decision of the Court of Appeals, a non-Indian in a "non-Indian community" may be prosecuted for violation of tribal ordinances only by the tribal government and not the federal government. But if Congress intended to grant the tribes exclusive jurisdiction over non-Indians in any instance it would presumably be for violations in *Indian* communities. Further, Congress in 1953 could hardly have meant to deprive non-Indians in "non-Indian communities" of the

protections of federal court while granting such protections to those in Indian communities.

Finally, the creation of this irrational system should not be ascribed to the Congress which in 1953 adopted H.R. Con. Res. 108, 83d Cong., 1st Sess. That resolution stated that the policy of Congress was, "as rapidly as possible," to subject the Indians to the "same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States." That resolution "reflected a return to the philosophy of the General Allotment Act of 1887." *Washington v. Confederated Tribes*, 439 U.S. 463, 488, n.32 (1979). Congress clearly did not intend through § 1161 to delegate power to Indian tribes over non-Indians in non-Indian Communities (without even mentioning those non-Indians) at the same time it enacted H.R. Con. Res. 108.

D. The arguments made by the Court of Appeals are not persuasive.

The Court of Appeals based its decision on three very slender reeds. The Court of Appeals held that the *Rice* Court, simply by citing in a footnote to the § 1151 definition of Indian country, rejected the definition in § 1154(c) which excludes non-Indian communities and rights-of-ways. *City of Timber Lake*, 10 F.3d at 557, A-7.

Petitioners submit that the bare citation of 18 U.S.C. § 1151 simply cannot carry the burden ascribed to it by

the Court of Appeals.[13] Section 1151 was and remains the basic definition of "Indian country" and in that sense was indeed applicable to the Pala Reservation at issue in *Rice*. In contrast to *Mazurie*, however, there was no question whether the *exceptions* to the Indian country definition as set out in §§ 1154(c) and 1156 would be applicable. Thus, the citation in *Rice* of 18 U.S.C. § 1151 is not surprising nor even arguably dispositive of the issue here.

The Court of Appeals further ignored this Court's citation in *Rice* to *Mazurie*'s statement that in 1949 the term "Indian country"

> was given a *narrower* meaning, insofar as relevant to the liquor prohibition, so as to exclude fee patented lands within "non-Indian communities" and rights-of-way through reservations. Act of May 24, 1949, 63 Stat. 94, 18 U.S.C. § 1154(c). . . .

Mazurie, 419 U.S. at 547 cited at *Rice*, 463 U.S. at 732, n.16 (emphasis added).

Above all, it is unlikely that the parties or this Court in *Rice* even *considered* the possibility that the Pala Reservation might include a non-Indian community or that the exceptions in 18 U.S.C. § 1154(c) were applicable to the facts of *Rice*. No argument on the issue is found in the

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[13] This conclusion becomes even more apparent when one considers that the *Mazurie* opinion, in connection with a discussion of the sale of alcohol in "Indian country," includes in a footnote a direct quotation of section 1154(c), *Mazurie*, 419 U.S. at 545, n.1.

presentations to this Court.[14] According to the 1980 census, the Pala Reservation had a population of only 559, of whom 433 were Indians. This makes it very unlikely that *any* non-Indian community existed on that tiny reservation. *See United States Department of Commerce, Bureau of the Census*, 1980 Census of Population, American Indian Areas and Alaska Native Villages: 1980, page 21.

Finally, it is questionable whether the citation of § 1151 was in fact "considered dicta" so as to merit the weight given it by the Court of Appeals. *City of Timber Lake*, 10 F.3d at 557, A-6. Footnote 1 in *Rice v. Rehner* is not a statement of the Court itself but is rather a citation to a statute. There is no emphasis of any particular word within the statute. *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 19 (1st Cir. 1991). Moreover, the citation must be read along with other statements within *Rice* which specifically refer to *Mazurie* as correctly determining the law in the matter. *See Rice*, 463 U.S. at 728-729, 730; *see also Rice*, 463 U.S. at 740-741 (Blackmun, J., dissenting).

The second of the slender reeds upon which the Court of Appeals rested its opinion was the citation in *Mazurie* of *United States v. Perrin*, 232 U.S. 478 (1914).

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[14] *See* Petitioner's Brief on the Merits, *Rice v. Rehner*, No. 82-401; Respondent's Brief on the Merits, *Rice v. Rehner*, No. 82-401; Brief for the United States as Amicus Curiae, *Rice v. Rehner*, No. 82-401; Brief for Amicus Curiae, State of Minnesota, et al., *Rice v. Rehner*, No. 82-401. Nor was the issue mentioned in oral argument. *See* Oral Argument, *Rice v. Rehner*, No. 82-401, March 21, 1983.

Perrin, however, did not involve any *delegation* of federal power to an Indian tribe, but rather concerned the permissible range of *federal* power over off-reservation lands and Indians.

Finally, the Court of Appeals relied upon the following quotation from the opinion of Justice White in *Brendale v. Confederated Tribes*, 492 U.S. at 428 (1989):

> There is no contention here that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of non members of the Tribe. Compare 18 U.S.C. §§ 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. § 1377(e) and (h)(1).

The Court of Appeals somehow read into this quotation a finding that § 1151 and not §§ 1154(c) or 1156 set the boundaries of "Indian country" for the purposes of § 1161. Of course, there was no question of liquor traffic raised in the *Brendale* case, and hence there was no need to consult the exceptions to § 1151 set out in § 1154(c).[15]

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[15] It is paradoxical, at best, to read the *Brendale* reference so expansively when *Brendale* specifically insists on an "express congressional delegation" of power over non-Indians. *See Brendale*, 492 U.S. at 426 (opinion of White, J.).

II. THE DECISION OF THE COURT OF APPEALS DISRUPTS THE CAREFULLY WROUGHT RELATIONSHIP BETWEEN TRIBES AND NON-MEMBERS AND DOES SO WITHOUT THE REQUIRED "EXPRESS CONGRESSIONAL DELEGATION" OF POWER.

A. The Decision of the Court of Appeals Disrupts the Careful Balance Between Non-member and Tribal Government Interests on the Reservations.

It is undisputed that in 1949 Congress excluded from the definition of "Indian country" for the purpose of federal liquor law "fee lands in non-Indian communities" and "rights-of-way" through reservations. 18 U.S.C. §§ 1154(c), 1156. This enactment was part and parcel of the actions of Congress intended to insulate non-members from the actions of a tribal government over which they have no control. This policy imperative has found expression in the decisions of this Court which have found a lack of inherent power not only in the liquor context, *see Rice v. Rehner*, but also in a variety of other circumstances.

The Court has demanded an "express congressional delegation" before it will recognize tribal jurisdiction over non-Indians when inherent power is lacking. In so demanding, this Court has properly deferred to Congress and has sought to guarantee the stability of the Indian/non-Indian relationship on reservations for the benefit of both groups.

In *Montana v. United States*, 450 U.S. 544 (1981), the Court found that the tribe could not exercise civil regulatory jurisdiction over non-Indians hunting and fishing on

fee lands over which the tribe did not have "absolute and undisturbed use and occupation." The Court found that the tribe could not exercise such power in the absence of an "express Congressional delegation." *Montana*, 450 U.S. at 564.

In *Brendale v. Confederated Tribes*, 492 U.S. 408, 430 (1989), Justice White, explicating *Montana*, stated that "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinances or actions in the tribal court, to regulate the use of fee land." Justice White also commented on the Court's "*insistence* in *Montana* on an *express* congressional delegation of tribal power over nonmembers. . . . " *Brendale*, 492 U.S. at 426. (Emphasis added.)

South Dakota v. Bourland, 113 S.Ct. 2309 (1993), affirms the analysis contained in the opinion of Justice White. The seven member majority in *Bourland* explicitly and repeatedly rejected the theory that the tribe retained inherent sovereignty over non-Indians on the public lands involved in that case. The Court referred to

> the reality that, after *Montana*, tribal sovereignty over nonmembers "cannot survive without express congressional delegation" . . . and is therefore *not* inherent.

Bourland, 113 S.Ct. at 2320, n.15.[16]

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[16] The Court of Appeals failed to consider the ramifications of finding the tribe had been delegated the power to enforce its regulations against non-Indians in non-Indian communities. One logical result is that if the tribe offends the rights of non-Indians when exercising its purported federal delegated power,

The lands at issue – fee lands in non-Indian Communities and rights-of-way – fall easily within the definition of those over which tribes have been found to lack inherent authority. Accordingly, pursuant to *Bourland, Brendale* and *Montana*, the Tribe must demonstrate the existence of an "express congressional delegation" in order to justify its exercise of authority.

B. Section 1161 is not an "express congressional delegation" of power.

Section 1161 does not constitute an "express congressional delegation" of power to tribes over non-Indians in non-Indian communities. Section 1161, on its face, merely makes certain provisions of federal law inapplicable under specified conditions (i.e., the "provisions . . . shall not apply").

One of the provisions of law which is made inapplicable is 18 U.S.C. § 1154(a), which states that it is illegal, as a matter of federal law, to sell or give away liquor to Indians in "Indian country." The term "Indian country" is, in turn, defined in 18 U.S.C. § 1154(c) to *exclude* "fee-

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recourse may be had against the federal government through an action in federal court. *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). Thus, should a tribe shut down a business without proper notice or cause, federal liability could follow. Similarly, should a tribe attempt to confiscate property, as it has done here, a similar violation may have occurred. *See Quechen Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976). The Tribe's assertion of the authority to impose a $5,000 "civil fine" raises additional questions. A-112.

patented lands in non-Indian communities or rights-of-way on Indian reservations. . . . "

Thus, in § 1161, Congress made § 1154 inapplicable within "Indian country," if certain requirements were met. To determine the scope of 18 U.S.C. § 1161, one need only (and indeed one *can* only) inspect the terms and scope of 18 U.S.C. § 1154 to determine what it was that Congress had made inapplicable.

Section 1161 gave to the tribes the power to regulate in certain areas of Indian country, but only within the framework of then-existing Indian liquor laws. That is why § 1161 starts with a reference to §§ 1154 and 1156, rather than rewriting all federal liquor control statutes relating to Indians. This congressional intent to work within the framework of existing law is further evidenced by the short title of § 1161: "Application of Indian liquor laws."[17]

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[17] The sparse legislative history of 18 U.S.C. 1161 supports the Petitioners' interpretation. The title of the Act certainly did not indicate a Congressional intention to delegate new powers to the tribe in non-Indian communities or rights-of-way but expresses merely the intention "to eliminate certain discriminatory legislation against Indians in the United States." 67 Stat. 586. The comments on the floor also supported that intention. Congressman Miller, for example, referred to the bill as one to eliminate certain discriminatory legislation against Indians in the United States. . . . " ___ Cong. Rec. 10928 (Aug. 1, 1953). The tribal defendants below relied on a statement of Rep. D'Ewart during the brief hearings that: "You know Indian country is defined as within the boundaries of Indian reservations." Read in context, however, the comment certainly does not reveal that Rep. D'Ewart intended that the definition of § 1151 apply, for the sweep of § 1151 applies to trust and dependent Indian

III. BASIC RULES OF STATUTORY CONSTRUCTION COUNSEL THAT LIQUOR STATUTES REGARDING INDIANS BE READ TOGETHER.

Section 1161 reads, in part:

> The provisions of § 1154, 1156 . . . of this title shall not apply within any area that is not Indian country . . . .

A-96. The Court of Appeals ignored one of the most basic rules of statutory construction – that statutes which consider the same subject matter are to be construed together. *See, e.g.*, 2B Sutherland's *Statutory Construction*, § 51.02. Here 18 U.S.C. §§ 1154 and 1156 address the same subject as 18 U.S.C. § 1161 and constitute the substance and essence of federal Indian liquor law. Therefore, the statutes should be construed together. When the statutes are construed together, it follows that the reach of 18 U.S.C. § 1161 is limited by the exception for non-Indian communities and rights-of-way found in 18 U.S.C. §§ 1154(c) and 1156.

The Court of Appeals instead mistakenly utilized the "Indian country" definition found in 18 U.S.C. § 1151. Section 1151 is *not*, of course, a liquor specific statute. To give the 18 U.S.C. § 1151 definition predominance would violate the "commonplace of statutory construction that the specific governs the general. . . . " *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2037 (1992) (citations omitted). This principle of statutory construction is so well established as to have been labeled "elementary," *see*

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communities beyond reservation boundaries. *See*, 18 U.S.C. § 1151(b) and (c).

Guidry v. Sheet Metal Pension Fund, 493 U.S. 365, 375 (1990), and "familiar law" *Bouliva Watch Company v. United States*, 365 U.S. 753, 758 (1961). This rule simply does not allow the more general definition of "Indian country" to determine the sweep of § 1161.[18]

IV. THE DISRUPTION OF LIQUOR TRAFFIC ON RIGHTS-OF-WAY THROUGH RESERVATIONS PROMISES TO BE SUBSTANTIAL UNDER THE COURT OF APPEALS DECISION.

According to the Court of Appeals, the "geographic scope of . . . tribal authority extends to a reservation's four corners." 10 F.3d at 558, A-7. Thus, the Appeals Court rejected the thesis that the exceptions set out in 18 U.S.C. § 1154(c) and § 1156 regarding non-Indian communities and rights-of-ways preclude the exercise of tribal jurisdiction. It follows therefore that the tribes arguably

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[18] Another rule of statutory construction calls for the same result. In *Reed v. Steamship Yaka*, 373 U.S. 410, 414 (1963), the Court indicated that when Congress amends certain sections of an Act but leaves others unamended, the prior construction of the statute by this Court "which has been left untouched" must be considered. In this case, 18 U.S.C. § 1161 was amended in 1984 by 98 Stat. 2028 (1984) (Section 3618 was changed to § 3669). Thus, the definitive construction by the Court of 18 U.S.C. § 1161 in *Mazurie*, together with the lower courts' construction in *Morgan*, 614 F.2d 166; *Mission Golf Course*, 548 F. Supp. 1177 and *Berry*, 420 F. Supp. 934, all lead to the conclusion that Congress intended to leave "untouched" the interpretation that fee lands in "non-Indian communities" and "rights-of-way" were outside of "Indian country" for the purpose of 18 U.S.C. § 1161.

were delegated federal authority to regulate liquor traffic on rights-of-way through reservations.

The potential problem engendered by the decision of the Eighth Circuit Court of Appeals is enormous and affects all magnitudes of highways. Furthermore, the potential effect, while serious within the Eighth Circuit, extends far beyond this circuit's boundaries and is certain to create new challenges elsewhere.

For example, Interstates 25 and 40 cross more than one reservation in New Mexico (in the Tenth Circuit). Interstate 40 also crosses at least one reservation within Arizona. Interstate 90 cuts a wide swath through the Crow Indian Reservation in Montana, and Interstate 84 runs through the Umatilla Reservation in Oregon (in the Ninth Circuit).

Hundreds, if not thousands, of federal, state and county roads run through other reservations. In South Dakota, United States Highways 12, 18, 83, and 212 all run through Indian reservations. Furthermore, state[19] and county highways 20, 34, 63, 65, 73 and 1806 run through Indian reservations.[20]

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[19] The Oglala Sioux Tribe has, in the past, seized the inventory of a wholesaler crossing the reservation for an alleged violation of its liquor control ordinance. The inventory was later released at the urging of the United States Attorney. A-132.

[20] In North Dakota, United States Highway 281 runs through an Indian reservation, as do United States Highways 2, 93 and 212 in Montana. State and county roads criss-cross reservations throughout the West.

The precise number of roads within and without this circuit has not been identified. But any of these roads are available for the transportation of liquor or, perhaps more to the point, *were* available for the transportation of liquor, at least 40 years before the Eighth Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY MICHAEL ENGEL*
MAY, ADAM, GERDES & THOMPSON
P.O. Box 160
Pierre, SD 57501-0160
Telephone: (605) 224-8803

KENNETH E. BARKER
QUINN, EIESLAND, DAY & BARKER
P.O. Box 370
Belle Fourche, SD 57717
Telephone: (605) 892-2743
Attorneys for Petitioners

*Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1148SD

City of Timber Lake, a South Dakota municipal corporation; City of Isabel, a South Dakota municipal corporation; City of Dupree, a South Dakota municipal corporation; American Legion Club, Edwin Hodges Post 124, of Dupree; Mickey Hutchinson, doing business as Mickeys Cafe & Lounge,

Appellees,

v.

Cheyenne River Sioux Tribe; Greg J. Bourland, in his official capacity as Chairman of the Cheyenne River Sioux Tribe; Marvin Lecompte, in his official capacity as Chief of Police of the Cheyenne River Sioux Tribe,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

Submitted: May 12, 1993

Filed: November 29, 1993

Before RICHARD S. ARNOLD, Chief Judge, and JOHN R. GIBSON and FAGG, Circuit Judges

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FAGG, Circuit Judge.

In this case, we must decide whether an Indian tribe has authority to regulate liquor sales on land held in fee by non-Indians in non-Indian communities within the boundaries of the tribe's reservation. The appellees, an American Legion Club, a non-Indian individual, and the South Dakota cities of Timber Lake, Isabel, and Dupree, all operate liquor establishments within the Cheyenne River Sioux Reservation on fee-patented lands in the cities. The appellees refused to obtain liquor and business licenses as required by ordinances 48 and 1 of the Cheyenne River Sioux Tribe, and the tribe brought an action in tribal court seeking to compel the appellees' compliance. The Cheyenne River Sioux Tribal Court permanently enjoined the appellees from operating their businesses within the reservation until they comply with the tribe's liquor control ordinance and business license ordinance. *Cheyenne River Sioux Tribe v. Isabel City Package Liquor*, 18 Indian L. Rep. 6079 (Chy. R. Sx. Tribal Ct. Jan. 8, 1991). The tribe's court of appeals affirmed in an unpublished opinion. *Cheyenne River Sioux Tribe v. Dupree American Legion Club*, mem. op. and order (Chy. R. Sx. Tribal Ct. App. Apr. 2, 1992).

The appellees then brought this action in federal district court against the tribe, its chairman, and its police chief (collectively the tribe), seeking permanently to enjoin the tribe from enforcing the ordinances against them. Before a trial on the merits of the permanent

injunction, the district court issued a preliminary injunction preventing the tribe from enforcing the ordinances against the appellees. The tribe appeals the district court's issuance of the preliminary injunction. We reverse the issuance of the preliminary injunction and remand with instructions.

In deciding a motion for preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *See Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112-14 (8th Cir. 1981) (en banc). We reverse the issuance or denial of a preliminary injunction if the issuance or denial is the product of an abuse of discretion or misplaced reliance on an erroneous legal premise. *Arkansas Peace Ctr. v. Department of Pollution Control & Ecology*, 999 F.2d 1212, 1216 (8th Cir. 1993).

The district court decided the appellees showed a likelihood of success on the merits because the tribe might lack authority to impose its liquor ordinance on the appellees as operators of liquor establishments on fee-patented lands in non-Indian communities. The tribe asserts this is an error of law because 18 U.S.C. § 1161 authorizes the tribe to regulate liquor traffic within reservation boundaries, notwithstanding the nature of the community regulated or ownership of the land. If the tribe is correct, the scope of the tribe's delegated authority would be broad enough to allow imposition of not only the liquor ordinance, but also imposition of the

business license ordinance on the appellees as operators of liquor establishments.

By passing the law codified as 18 U.S.C. § 1161, Congress "delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." *Rice v. Rehner*, 463 U.S. 713, 715 (1983). The relevant part of § 1161 provides:

> The provisions of sections 1154, 1156 . . . shall not apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the [governing] tribe. . . .

18 U.S.C. § 1161 (1988). The tribe asserts the applicable definition of Indian country is found in § 1151, which states, "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent. . . . " 18 U.S.C. § 1151(a) (1988). The appellees counter that the applicable definition of Indian country is found in 18 U.S.C. §§ 1154 and 1156, the federal criminal statutes that prohibit the introduction of liquor into Indian country and the possession of alcohol in Indian country. These statutes both state, "The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities. . . . " 18 U.S.C. §§ 1154(c), 1156 (1988). The appellees essentially contend the tribe's authority to regulate liquor within

Indian reservations under § 1161 is geographically limited to the reservation areas in which the federal criminal statutes, §§ 1154 and 1156, apply.

In support of their statutory interpretation, the appellees rely on our decision in *United States v. Morgan*, 614 F.2d 166, 171 (8th Cir. 1980). In that case, non-Indians who operated liquor establishments on fee-patented lands within a reservation appealed a district court order enjoining them from selling liquor until they obtained tribal liquor licenses. *Id.* at 168-69. We reversed, holding tribal liquor license requirements under § 1161 did not apply to the non-Indians operating liquor establishments on fee-patented lands because the establishments were in non-Indian communities, and thus, not within Indian country as defined in § 1154(c). *Id.* at 171. We focused on the definition of non-Indian community, and applied § 1154(c)'s definition of Indian country without exploring its applicability to § 1161. *See id.* at 169-71.

We agree with the appellees that *Morgan* supports their position, and generally, one panel of this court must follow the decision of an earlier panel. The general rule does not apply, however, when a Supreme Court decision casts doubt on the earlier panel's decision. *Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992). We believe Supreme Court decisions undermine our decision in *Morgan*.

In declaring that Congress gave states as well as the Indian tribes authority to regulate liquor distribution in Indian country, the Supreme Court specifically referred to the general definition of Indian country in § 1151, which includes all fee lands within reservations, and not the

definition in §§ 1154(c) and 1156, which excludes fee lands in non-Indian communities. *Rice*, 463 U.S. at 715 & n.1. The appellees argue *Rice* does not control because it addressed the question of state authority to regulate liquor transactions in Indian country under § 1161 rather than tribal authority. Federal courts, however, are not "free to limit Supreme Court opinions precisely to the facts of each case." *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992). Instead, federal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement." *Id.*

The Supreme Court's statements in *Rice* about Indian tribes having authority to regulate liquor distribution in Indian country under § 1161 were at the very least deliberated dicta. The question in *Rice* was whether a state could require the operator of a general store on an Indian reservation to obtain a state liquor license. *Rice*, 463 U.S. at 715. The Supreme Court examined § 1161 and concluded Congress authorized state regulation over Indian liquor transactions. *Id.* at 726. In reaching its conclusion, the Court noted § 1161's legislative history shows Congress intended that state laws would apply to tribal liquor transactions as long as the tribe itself approved the transactions by enacting an ordinance. *Id.* The Court remarked it had already held in *United States v. Mazurie*, 419 U.S. 544 (1975), that by enacting § 1161, Congress delegated part of its authority over liquor transactions on Indian reservations to Indian tribes. *Rice*, 463 U.S. at 730. This delegated power allows a tribe to regulate the sale of

alcohol by non-Indians on fee-patented lands within reservation boundaries. *Mazurie*, 419 U.S. at 546, 553-58. The Court stated the delegation of power is found in § 1161's language requiring that liquor transactions conform "'*both* with the laws of the State . . . and with an ordinance duly adopted' by the governing tribe." *Rice*, 463 U.S. at 730 (quoting 18 U.S.C. § 1161). The Court observed it would ignore § 1161's plain language if the Court failed to find the same delegation in the states' favor. *Id.* at 730-31. Thus, *Rice* makes clear that tribes possess authority to regulate liquor transactions in Indian country.

By specifically referring to the broad definition of Indian country in § 1151, *id.* at 715 & n.1, the Court in *Rice* also made clear that the geographic scope of state and tribal authority extends to a reservation's four corners. The appellees' reliance on the narrow definition of Indian country in §§ 1154(c) and 1156 is simply misplaced. By the express terms of §§ 1154(c), 1156, and 1151, the narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition in § 1151 applies to all other sections in the chapter, like § 1161. Further, § 1161's delegation of regulatory power to the tribes is not derived from §§ 1154 and 1156. The Court in *Rice* noted that in *Mazurie* it had rejected the view that § 1161 was merely an exemption from federal criminal liability. *Rice*, 463 U.S. at 730. Instead, the Court said § 1161 affirmatively empowers both the Indian tribes and the states to regulate liquor transactions. *Id.* Indeed, the viability of federal prosecution under §§ 1154 and 1156 now turns on § 1161, which exempts an otherwise potential defendant from federal prosecution under §§ 1154

and 1156 if the person conforms with a tribal ordinance adopted under the tribe's delegated power. *See id.* at 728. Also, a careful reading of *Mazurie* shows that when the Court said § 1161 is a Congressional delegation of power to Indian tribes to regulate liquor sales on fee lands within reservations, the Court meant all fee lands within reservations, including fee lands in non-Indian communities. *See Mazurie*, 419 U.S. at 554 (discussing *Perrin v. United States*, 232 U.S. 478, 482 (1914), which "dealt with the sale of intoxicating beverages within premises owned by non-Indians, on privately held land in an organized non-Indian municipality"). Finally, after *Rice*, a plurality of the Supreme Court indicated that the geographic scope of the authority Congress delegated to regulate liquor traffic in Indian country includes fee lands in non-Indian communities. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (plurality) (citing 18 U.S.C. § 1151 in conjunction with § 1161 as an example of express Congressional delegation of authority over non-Indians).

In light of the Supreme Court's decisions, we conclude Congress delegated the tribe authority to regulate liquor traffic on fee lands owned by non-Indians in non-Indian communities within reservations. This delegated authority permits the tribe to impose both the liquor control ordinance and the business license ordinance on the appellees in this case. Given our conclusion that Congress expressly delegated authority to the tribe, we need not decide whether the tribe has inherent sovereign power to regulate liquor sales by non-Indians. *See Montana v. United States*, 450 U.S. 544, 564-66 (1981) (providing exceptions to general rule that tribe's inherent

sovereign powers do not extend to non-Indian activity). Because the district court based its issuance of the preliminary injunction on the erroneous view that the tribe lacks authority to impose the liquor control ordinance and business license ordinance on the appellees, we reverse the issuance of the preliminary injunction. *See Arkansas Peace Ctr.*, 999 F.2d at 1216; *see also Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987).

The appellees contend the district court should have granted the injunction against enforcement of the tribal court's compliance order on the ground that the tribal constitution does not give the tribal court personal jurisdiction over the appellees. The appellees raised this contention in their brief as a cross-appeal. The tribe filed a motion to strike the cross-appeal, arguing the district court's injunction order granted the appellees all the relief they requested and the appellees' cross-appeal merely asserted an alternative ground for affirming the district court. Another panel of this court granted the tribe's motion to strike and dismissed the cross-appeal. Thus, as the tribe recognized in its motion to strike the cross-appeal, the appellees' contention remains before this panel as an alternative ground for affirmance. The appellees raised the contention in the district court, but the district court did not address it. We could simply reverse without considering the contention because the district court based its issuance of the injunction on an error of law, and leave the appellees to pursue their alternative ground in the district court. Because the

appellees' contention presents a question of law, however, we will address it now in the interest of judicial economy.

We reject the appellees' contention. The tribal courts interpreted the constitutional language as allowing the tribal courts to exercise personal jurisdiction over the appellees, 18 Indian L. Rep. at 6080; Tribal Ct. App. mem. op. at 4-6, and we defer to the tribal courts' interpretation, even though non-Indians are involved, *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988); *see Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). Further, the appellees do not assert that any federal law has curtailed the tribe's power to assert jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985) (explaining limitations of federal question jurisdiction); *see Sanders*, 864 F.2d at 633. We also note that after the tribal courts issued their decisions, the tribe amended its constitution to state, "The tribal courts shall have jurisdiction over claims and disputes arising on the reservation." Although the tribal courts have not had an opportunity to consider the question, *see National Farmers*, 471 U.S. at 855-57 (requiring exhaustion of tribal court remedies before consideration by district court), we believe the amendment would cover the appellees.

Having decided the district court's decision to grant a preliminary injunction was premised on an erroneous interpretation of § 1161, we reverse. We remand to the district court with instructions to dismiss this action on the merits.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CITY OF TIMBER LAKE, a South Dakota municipal corporation; CITY OF ISABEL, a South Dakota municipal corporation; CITY OF DUPREE, a South Dakota municipal corporation; DUPREE AMERICAN LEGION CLUB EDWIN HODGES POST 124; and MICKEY HUTCHINSON, d/b/a MICKEY'S CAFE AND LOUNGE, Plaintiffs, vs. CHEYENNE RIVER SIOUX TRIBE; GREG J. BOURLAND, in his official capacity as Chairman of the Cheyenne River Sioux Tribe; and MARVIN LECOMPTE, in his official capacity as Chief of Police of the Cheyenne River Sioux Tribe, Defendants.	CIV. 92-5079 (Filed DEC 21 1992) MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

On November 14, 1992, the parties in this case stipulated to the continuation of a temporary restraining order enjoining defendants from enforcing the tribal liquor ordinances of the Cheyenne River Sioux Tribe against

plaintiffs. This stipulation will expire on December 24, 1992, twenty days after this Court resolved the parties' cross motions for summary judgment. A similar restraining order has been in effect, by the Court's order and by stipulation of the parties, for most of the period from June 19, 1992, to the present.

After having denied the parties' cross motions for summary judgment at the hearing held on December 4, 1992, the defendants informed this Court at that hearing that further discovery on the merits of the case was needed. Pursuant to this representation, a scheduling order was entered setting a deadline for discovery of June 1, 1993, and a trial date of July 13, 1993.

By letter dated December 7, 1992, defendants notified this Court of their intention to refuse to stipulate to further continuation of any temporary injunction beyond December 24, 1992, the date the current stipulation expires. On December 10, 1992, this Court entered an order notifying the parties of its intent to enter a preliminary injunction and setting a deadline for objections to such injunction. On December 16, 1992, plaintiffs filed a motion for a preliminary injunction. On December 17, 1992, defendants filed objections pursuant to the Court's December 10 order. For the reasons discussed below, this Court will issue a temporary injunction preserving the status quo until resolution of this case by a trial on the merits or otherwise.

DISCUSSION

This Court may issue a preliminary injunction pursuant to the guidelines for issuing such an order as set

out in the benchmark case of *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). *Dataphase* establishes four factors which a district court should consider in determining whether to issue a preliminary injunction:

1. the threat of irreparable harm to the plaintiffs;

2. the state of the balance between this harm to the plaintiffs and the injury that granting the injunction will inflict on defendants;

3. the probability that the plaintiffs will succeed on the merits; and

4. the public interest.

Id. at 113-14. The overriding question is whether the balance of equities favors the plaintiffs to such an extent that "justice requires the court to intervene to preserve the status quo until the merits are determined." *Id.* at 113. Although the *Dataphase* court stated that "no single factor is determinative," it also stated that failure to demonstrate that there is a threat of irreparable harm is grounds by itself to deny a request for a preliminary injunction. *Compare id.* at 113, *with id.* at 114, and 114 n.9. This Court will consider the *Dataphase* factors in order to determine whether to issue a preliminary injunction in this case.

A. THREAT OF IRREPARABLE HARM TO PLAINTIFFS

Plaintiffs have been operating businesses on fee-patent land within the boundaries of the reservation of the Cheyenne River Sioux Tribe for many years. Never, until

now, have they been faced with the possibility that they would have to obtain a tribal license in order to conduct their businesses. If the Court does not enjoin defendants from enforcing their ordinance against plaintiffs pending trial, and if thereafter licenses are not quickly granted to plaintiffs by the tribe, plaintiffs will suffer harm due to the indefinite complete shut-down of their businesses.[1]

The general rule is that economic harm which is measurable does not constitute irreparable harm. *See* 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2948, at 431-41 (1973); and *Fort Smith Beepers Inc. v. Mobilefone Service, Inc.*, 533 F. Supp. 685, 688-89 (W.D. Ark. 1981). However, economic harm can constitute irreparable harm where the monetary losses cannot be ascertained with accuracy or where the economic losses threaten the very existence of a business. *Fort Smith Beepers, Inc.*, 533 F. Supp. at 688-89 (holding that economic harm is not irreparable injury unless there are extraordinary circumstances such as an economic loss which is so great it will destroy the business or the amount of financial harm is "impossible to ascertain with accuracy.").

In this case, the economic harm which threatens plaintiffs if defendants are not enjoined pending trial is irreparable. All of plaintiffs' businesses operate on a

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[1] All but two of the plaintiffs' businesses are engaged exclusively in the sale of alcohol so that a denial of a tribal liquor license would effectively close the business. The American Legion and Mickey's Cafe and Lounge appear to be the exceptions to this generalization. Presumably, if their ability to sell liquor were taken away, they would suffer substantial harm, but they could still sell meals, have entertainment, etc.

small scale in small communities. Trial in this matter will not occur for seven months, at defendants' request. If defendants are not enjoined, there exists the very real probability that plaintiffs' businesses will be halted completely for those seven months. Given the current economic conditions, it is a distinct probability that such a hiatus in plaintiffs' operation of their businesses could destroy those businesses. Furthermore, plaintiffs' lost profits resulting from such a hiatus may well be incapable of accurate measurement. Therefore, the economic harm plaintiffs are threatened with is irreparable.

In addition to the foregoing, the pleadings establish that at one point the defendants forcibly closed the businesses of plaintiff the city of Timber Lake and of plaintiff Mickey Hutchinson in an attempt to force plaintiffs into compliance with the tribal liquor ordinances. If no injunction is in place, defendants might again attempt such actions. Any time force is involved and emotions run high, there is always the possibility that someone may be injured or, in extreme cases, that loss of life may occur. These possibilities only buttress this Court's conclusion that there is a threat of irreparable harm should a temporary injunction not issue.

The defendants' argument that failure to enter a preliminary injunction at this point will only result in plaintiffs having to pay the tribe $100 each ignores the substantive provisions of the tribal ordinance,[2] the possibility

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[2] The tribal ordinance requires any entity seeking to engage in liquor traffic on the reservation to obtain a tribal liquor license. Cheyenne River Sioux Tribal Ordinance 48, § 3, *reprinted in* Appendix A, Exhibit C, of Defendants' Motion for Summary

that no licenses would be issued at all,[3] and the past history of conduct of the parties in this case. Accordingly, this Court finds that the first *Dataphase* factor is established.

B. STATE OF THE BALANCE BETWEEN THE THREATENED HARM TO PLAINTIFFS AND THE INJURY TO DEFENDANTS THAT GRANTING THE INJUNCTION WILL INFLICT

The second *Dataphase* factor requires this Court to balance the threatened irreparable injury to plaintiffs against the injury which defendants will suffer should this Court enjoin their enforcement of their tribal liquor ordinance. This Court notes that the tribal ordinance in question is of very recent origin and that no revenues from plaintiffs have ever actually been collected. Therefore, enjoining defendants prior to trial will not result in a

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Judgment. The tribal ordinance also contains substantive provisions prohibiting sale of liquor on tribal election day while the polls are open, sale of liquor to pregnant women and intoxicated persons, and sale of liquor through a drive-up window. *Id.* at §§ 4-1-2, 4-1-5, 4-1-6, and 4-1-9.

[3] The tribal liquor ordinance sets out qualifications which a liquor license applicant must meet, but even if an applicant meets the qualifications, the Alcoholic Beverage Control Commission is not required to grant a license. Instead, the commission is given broad, almost limitless discretion to grant or deny licenses in the best interests of the tribe. Cheyenne River Sioux Tribal Ordinance 48, § 3, *reprinted in* Appendix A, Exhibit C, of Defendants' Motion for Summary Judgment. One of the asserted purposes of the act is to "minimize alcohol consumption among residents of the reservation" and to "control the supply of alcoholic beverages through taxation and regulation." *Id.* at 1-1-2(A), (E).

shortfall in the tribal budget by removing licensing fees from that budget which were anticipated by the tribe.

At trial in the tribal courts, defendants argued that the mere presence of alcohol on the reservation contributes to the pervasive alcohol-related problems on the reservation, such as crime, automobile accidents, and fetal alcohol syndrome. The Court agrees that these problems exist on the tribe's reservation and that alcohol is a contributing factor, but allowing defendants to assert their ordinance against plaintiffs may not substantially affect these alcohol problems. This is because numerous other liquor establishments exist on reservation trust lands and these establishments will continue to dispense liquor regardless of whether the defendants are enjoined.[4]

In their objections to the entry of this order, defendants also rely heavily on the tribal courts' conclusions. However, the issue decided by the tribal courts ultimately rested solely on the interpretation of 18 U.S.C. §§ 1151, 1154(c), and 1161. As interpretation of these statutes present a question of federal law, this Court must determine the question *de novo* and thus, the tribal courts' conclusions are not persuasive.

Therefore, the Court finds that, under the second *Dataphase* factor, the balance of harm to the defendants should the injunction be granted is outweighed by the

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[4] Specifically, the pleadings in this matter establish that numerous liquor establishments exist in the community of Eagle Butte.

threat of irreparable injury to plaintiffs should the injunction be denied.

C. PROBABILITY THAT PLAINTIFFS WILL SUCCEED ON THE MERITS.

Defendants' main objection to the entry of a preliminary injunction in this case rests on their allegation that plaintiffs have no likelihood of success on the merits. Establishing that plaintiffs will probably succeed on the merits does not always require a showing that plaintiffs enjoy a better-than-50 percent chance of succeeding. Rather, the strength of the showing that plaintiffs will probably succeed is inversely proportional to the showing of irreparable harm. *Dataphase*, 640 F.2d at 113. Therefore, the stronger the showing of irreparable harm, the weaker may be the showing that plaintiffs will probably succeed on the merits, and vice versa. Where the showing of threatened irreparable harm is very strong, as in this case, plaintiffs need only show that serious questions exist going to the merits of the case.

This Court has thus far refused to make a decision on the merits of this case due to the existence of genuine issues of material fact concerning aspects of all issues presented. However, plaintiffs have presented a persuasive argument concerning the interpretation of 18 U.S.C. §§ 1151, 1154(c), and 1161. Additionally, plaintiffs' arguments concerning the first *Montana*[5] exception based on consent is also persuasive. The issue most in defendants'

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[5] *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

favor is the second *Montana* exception based on threat to the health and welfare of the tribe. However, this last issue is also the one on which the most questions of fact remain to be determined.

Defendants rely heavily on the tribal courts' conclusions in arguing that plaintiffs cannot show a likelihood of success on the merits. As discussed above, because the tribal courts' conclusions ultimately rested upon interpretation of federal statutes, the tribal courts' conclusions are not persuasive in this Court.

Defendants also rely heavily on *Buster v. Wright*, 135 F. 947, *appeal dismissed*, 203 U.S. 599, 27 S. Ct. 777, 51 L. Ed. 334 (1906). *Buster* is inapposite to the case at bar for two reasons. First, although the *Buster* court refrained from holding whether the tribal ordinance at issue in that case was a license or a tax, it is clear that it was more like a tax in that it contained none of the substantive provisions which the tribal ordinance in this case contains.[6] Furthermore, payment of the tax in *Buster* automatically resulted in the business being granted a right to do business whereas under the defendants' ordinance, the license may be withheld even if the license applicant meets all the requirements.[7]

Second, *Buster* is distinguishable because it rejected an argument which the United States Supreme Court has subsequently accepted. Namely, that the passing of the allotment acts by Congress in the late 1800s and early 1900s extinguished inherent tribal authority over non-

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[6] *See supra* note 2.

[7] *See supra* note 3.

tribal members residing on fee-patent land within non-Indian communities. *Compare Buster*, 135 F. at 951-53, 958, *with Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 422-23, 109 S. Ct. 2994, 3004, 106 L. Ed. 2d 343 (1989) (citing *Montana v. United States*, 450 U.S. 544, 560 n. 9, 101 S. Ct. 1245, 1256 n.9, 67 L. Ed. 2d 493 (1981)). Therefore, defendants' reliance on *Buster* as authority in this case is misplaced.

Defendants finally cite *Rice v. Rehner*, 463 U.S. 713, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1983), as authority that the Supreme Court interprets 18 U.S.C. § 1161 as an express delegation to Indian tribes to regulate liquor traffic conducted by non-tribal members on fee-patent land located within the reservation. However, the issue in *Rice* was not the authority of Indian tribes over non- members, but rather the authority of states to regulate liquor traffic under section 1161. *Id.* at 720-25, 103 S. Ct. at 3296-99. Furthermore, *Rice* contains strong statements to the effect that any inherent authority Indian tribes might once have had over liquor traffic has long since disappeared due to extensive federal regulation in this area. *Id.* at 722, 103 S. Ct. 3297 (citing Felix S. Cohen, *Handbook of Federal Indian Law* at 307 (1982)). Defendants' reliance on *Rice*, therefore, is not conclusive of their claim that plaintiffs have no likelihood of success on the merits.

Given the strong possibility of serious irreparable harm to plaintiffs, and the colorable possibility of plaintiffs' success on the merits, this Court finds that the third *Dataphase* factor has been satisfactorily established.

D. THE PUBLIC INTEREST

This Court takes judicial notice that all or part of nine Indian reservations are located within the District of South Dakota. On those reservations reside many non-Indians on fee-patent lands. These non-Indians have long relied on the assumption of their own autonomy, reaping not only the benefits of doing business without benefit of tribal licensing, but also shouldering the burdens of providing their own law enforcement, fire protection, road maintenance, and local governments.

By contrast, the tribes residing on these reservations have not relied on an ability to enforce licensing ordinances against non-Indians on fee-patent lands. The very recent origin of the tribal liquor license in question belies such a long-standing reliance.

Defendants characterize the ordinance in this case as merely a tax and argue that the public interest does not favor allowing plaintiffs to escape this tax. This argument fails to take into account the substantive provisions of the ordinance and the possibility that no licenses would be issued to plaintiffs even if they complied with the requirements set forth in the ordinance.[8] This argument is, for those reasons, unpersuasive.

Given that the defendants in this case may ultimately be found to lack the authority to enforce their licensing ordinance against plaintiffs, and the upheaval throughout this district which may occur if this Court allows defendants to enforce their ordinance in the interim before

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[8] *See supra* notes 2 and 3.

trial, the public interest favors granting an injunction in plaintiffs' favor.

CONCLUSION

This Court concludes that all the *Dataphase* factors favor temporarily enjoining defendants until trial. Plaintiffs' motion for a preliminary injunction (Docket No. 48) is therefore granted. Accordingly, it is hereby

ORDERED that the tribal court and its judges are restrained from conducting the hearings on contempt proceedings against plaintiffs until further order of this Court.

IT IS FURTHER ORDERED that defendants and any agency, court, or agent of the Cheyenne River Sioux Tribe are temporarily enjoined and restrained from enforcing the tribal liquor licensing ordinances numbered 1 through 48 as against plaintiffs. This injunction will remain in effect until the disposition of this case by a trial on the merits or otherwise.

IT IS FURTHER ORDERED that the evidentiary hearing on the preliminary injunction is hereby consolidated with plaintiffs' request for permanent injunctive relief pursuant to Fed. R. Civ. P. 65(a) and D.S.D. LR 65.1. Both issues will be tried at the trial on the merits.

Dated this 21st day of December, 1992.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: /s/ Alice R. Raisly
Deputy Clerk

(SEAL)

NOTICE OF ENTRY

Take notice that the original of this copy was filed on 12-21-92 and entered on docket on 12-21-92 in the office of the Clerk of the United States District Court for the District of South Dakota.

/s/ William F. Clayton
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CITY OF TIMBER LAKE, A South Dakota municipal corporation; CITY OF ISABEL, a South Dakota municipal corporation; CITY OF DUPREE, a South Dakota municipal corporation; DUPREE AMERICAN LEGION CLUB EDWIN HODGES POST 124; and MICKEY HUTCHINSON, d/b/a MICKEY'S CAFE AND LOUNGE, Plaintiffs, v. CHEYENNE RIVER SIOUX TRIBE; GREG J. BOURLAND, in his official capacity as Chairman of the Cheyenne River Sioux Tribe; and MARVIN LECOMPTE, in his official capacity as Chief of Police of the Cheyenne River Sioux Tribe, Defendants.	CIV 92-5079 (Filed June 19, 1992) TEMPORARY RESTRAINING ORDER

Plaintiffs have filed an action consisting of a summons, complaint, motion for temporary restraining order, and supporting affidavits. Plaintiffs consist of municipal and individual alcoholic beverage licensees under the laws of the state of South Dakota. Defendant Cheyenne River Sioux Tribe (CRST) seek to license plaintiffs' liquor establishments under CRST tribal ordinances numbered 1 and 48. CRST, in the enforcement of the tribal ordinances,

has obtained an order dated January 8, 1991, from the tribal court permanently enjoining plaintiffs from operating their liquor establishments within the exterior boundaries of the Cheyenne River Sioux Indian Reservation unless the plaintiffs first purchased business and liquor licenses pursuant to the tribal ordinances. Plaintiffs have exhausted their tribal remedies and the Cheyenne River Sioux Tribal Court has now set a hearing on June 23, 1992, at 9 a.m. requiring plaintiffs to show cause why they should not be held in contempt for violating the tribal court order.

The Court has examined plaintiffs' submissions. Fed. R. Civ. P. 65(b) provides that this Court may issue a temporary restraining order where it appears that the applicants will suffer immediate harm and injury. The Court has determined that a jurisdictional question exists as to the authority of the CRST to assert authority over such licensees.

Pursuant to Fed. R. Civ. P. 65(c), applicants shall not be required to provide bond. Accordingly, it is

ORDERED that the tribal court and its judges are restrained from conducting the contemplated hearing set for June 23, 1992, at 9 a.m., or any adjournment thereof until further order of the Court.

IT IS FURTHER ORDERED that defendant Cheyenne River Sioux Tribe, Greg J. Bourland, Chairman of the Cheyenne River Sioux Tribe, Marvin LeCompte, Chief of Police, and any unnamed agency of the Cheyenne River Sioux Tribe, including the Cheyenne River Sioux Tribal

Court, are hereby enjoined and restrained from enforcement of tribal ordinances number 1 and 48 as against plaintiffs.

IT IS FURTHER ORDERED that a hearing on the matter of the issuance of a preliminary injunction shall be held before this Court on Friday, June 26, 1992, at 10 a.m., at 515 Ninth Street, Rapid City, South Dakota.

IT IS FURTHER ORDERED that the Clerk shall forthwith notify counsel of record, including Mark Van Norman, counsel for Cheyenne River Sioux Tribe, for the purpose of this temporary restraining order. Notice to the defendants shall be effective by service upon the tribal attorney.

This order is entered this 19th day of June, 1992, at 8 a.m.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
UNITED STATES
DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ Kathleen A. Jeffries
Deputy Clerk

(SEAL)

CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS
CHEYENNE RIVER INDIAN RESERVATION

***

I. Introduction

The Cheyenne River Sioux Tribe, the Plaintiff/Respondent herein, has implemented a comprehensive business licensing and alcoholic beverage control policy. As part of this policy, the Cheyenne River Sioux Tribe adopted an ordinance[1] which requires, *inter alia*, any individual or entity that wishes to sell liquor on the reservation to obtain a tribal liquor license, a tribal business license, and to comply with tribal regulations governing the distribution of alcoholic beverages.

All[2] of the Defendants/Appellants are either individual non-Indians or non-Indian corporations or municipal entities who sell liquor on the reservation. All of them have refused to obtain the requisite tribal business and

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[1] Cheyenne River Sioux Tribal Ordinance No. 48, Alcohol Beverage Control Law, provides, at Sec. 3-1-1 "Any person intending to introduce, sell, trade, transport or manufacture alcoholic beverages on the Cheyenne River Indian Reservation shall make application for a license and present the completed application to the Cheyenne River Sioux Revenue Department." The authority to grant such licenses is vested in the Cheyenne River Sioux Tribal Alcoholic Beverage Control Commission, Secs. 3-1-7 and 3-1-8. In addition, Cheyenne River Sioux Tribal Ordinance No. 1 (adopted in 1937, revised in 1984) requires all individuals and entities doing business on the Reservation to have a tribal business license.

Cheyenne River Sioux Tribal Ordinance No. 48 was certified by the Secretary of Interior and published in the Federal Register on June 2, 1988.

[2] The named Defendants/Appellants are Dupree American Legion Club, Dupree Off Sale and Dupree On Sale, Farmers Union Oil Co., Isabel City Package Liquor, Mickey's Cafe and Lounge, Firesteel Country Store, and Timber Lake City Package Liquor.

liquor licenses. As a result, the tribe commenced this action to compel each of the defendants to obtain the proper licenses and to comply with tribal regulations governing the distribution of alcoholic beverages.

The Defendants/Appellants challenged the trial court's jurisdiction,[3] as well as claiming exemption from tribal regulation as a matter of federal law.[4] The trial court denied the Defendants/Appellants' motion to dismiss, as well as the parties' cross-motions for summary judgment. The trial court also granted the Plaintiff/Respondent's motion *in limine* to disallow the presentation of evidence relevant to the demographics and most other social data in and around the communities where the defendants carry on their retail liquor activities. Defendants/Appellants also made a motion to recuse the trial judge, the Honorable Jane Brown. This motion was also denied.

The case proceeded to a four-day (non-jury) trial. At the conclusion of trial, the trial judge ruled in favor of the Plaintiff/Respondent and ordered that all the Defendants/Appellants must obtain the required tribal business and liquor licenses. All of the Defendants/Appellants filed timely notices of appeal. The Defendants/Appellants also sought a stay pending appeal,

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[3] This claim is premised on Cheyenne River Sioux Tribe By-Laws, Art. V, Sec. 1(c), which conditions civil jurisdiction in a lawsuit between Indians and non-Indians by requiring a stipulation of the parties.

[4] This claim is premised on an analysis of the 'exemptions' for a 'fee patented land' in a 'non-Indian communities' set out at 18 U.S.C. §§ 1154 and 1156.

which was ultimately denied by the trial court for failure to post the required bond.[5] This resulted in an interlocutory appeal to this Court, which also denied the motion for a stay, but further urged the parties to seek a reasonable accommodation on the issue of the posting of bond pending appeal.[6]

II. Issues:

This appeal presents four issues. They are:

A) Whether the trial court had proper jurisdiction over this lawsuit, [sic]

B) Whether federal law, namely 18 U.S.C. §§ 1154 and 1156, precludes tribal jurisdiction over these liquor establishments because they are located on 'fee land' in 'non-Indian communities;'

C) Whether the trial judge erred as a matter of law is failing to recuse herself; and

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[5] Rule 37(f) of the Cheyenne River Sioux Rules of Civil Procedure provides "In any case which an appeal is perfected as required by this Rule, the appellant may petition the tribal court upon notice to all respondents for an order staying the order, commitment or judgment rendered conditioned upon execution of a bond to guarantee performance of judgment, order or commitment. A stay shall only be granted in those cases in which manifest injustice would result if no stay were issued."

[6] The current status on the stay is that all the named Defendants/Appellants have posted the required bond and remain open for business.

D) Whether the trial court erred in admitting the hearsay testimony of one of the Plaintiff/Respondent's witnesses.

III. Discussion:

Each issue will be discussed in turn. [sic]

A) Jurisdiction

This claim may be readily disposed of. The Defendants/Appellants' claim is premised on the threshold argument that the Plaintiff/Respondent, Cheyenne River Sioux Tribe, is an 'Indian' within the meaning of the term as it appears at Cheyenne River Sioux By-Law Art V., Sec. 1(c).[7] The Tribal By-Law does not define the term. The Defendants/Appellants make no argument, compelling or otherwise, to demonstrate that the Cheyenne River Sioux Tribe is an 'Indian' within the contested By-Law. Apparently, it is merely assumed and it is a fatal assumption. Indeed, both the common sense and general legal definition[8] of the term 'Indian' refers to individuals, not

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[7] This By-Law (as noted in footnote 3) conditions civil jurisdiction in a lawsuit between Indians and non-Indians on a stipulation of the parties.

[8] For example, the term 'Indian' has been defined variously as membership in a federally recognized tribe, one-half or one-fourth Indian blood in federal statutes such as the Indian Reorganization Act, 25 U.S.C. § 479 (1982) and the Johnson O'Malley Act, 25 U.S.C. §§ 452-457 (1982 & Supp. 1987), 25 C.F.R. § 273.12 (1988). In addition, federal criminal jurisdiction defines "Indian" as "whether the person in question has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian." Clinton, "Criminal

the collective sovereign. Just as ordinary civil and legal parlance distinguishes between individuals as citizens and residents and the sovereign itself, such a distinction is equally appropriate in the Indian/tribal context.

This claim is particularly nefarious in its implications. Such a reading as the Defendants/Appellants advance would compel the conclusion that the tribe could not effectively regulate any non-Indian conduct, because the enforcement of sanctions through litigation initiated by the sovereign would be contingent on the stipulation of the alleged wrongdoers. This would hardly meet basic foundational notions of due process and equal protection under the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(8), by permitting one class of individuals (i.e., non-Indians) to have the unilateral authority to disregard reasonable laws of the sovereign, which would apply to all others. This contention of the Defendants/Appellants would take the concept of tribal jurisdiction to a new practical and theoretical low point devoid of any legal or public policy support. See for example this Court's opinion in *Thorstenson v. Cudmore*, # 88-018-A, for a detailed analysis of the deeply problematic nature of the history, public policy, and due process concerns surrounding adoption of the By-Law itself.

In brief summary then, there is no convincing analysis, legal or otherwise, to read into the meaning of the word 'Indian' the term 'tribe,' especially when the implications of doing so are contrary to ordinary common

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Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 520 (1976).

sense and legal meanings of the terms, as well as sound (tribal) public policy and the federal and tribal cornerstone commitments to due process and equal protection. In addition, even if this Court accepted the far fetched claim of the Defendants/Appellants (which it does *not*), it is likely that the necessary 'stipulation' would be found in the continuous presence and conduct of the Defendants/Appellants' engaging in business on the reservation with 'Indians.' Such a finding would also readily comport with the analysis set forth in *Montana v. United States*, 450 U.S. 544 (1981), which recognizes the legitimacy of tribal authority over non-Indian activities on fee land that are based on consensual commercial arrangements.

B) Federal Delegation, 18 U.S.C. § 1161, and the 'exemptions' of 18 U.S.C. §§ 1154 and 1156.

1. Statutory Analysis

From the earliest days of the Republic, the introduction of liquor into Indian country[9] has been substantially regulated by Congress. This policy was rooted in the

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[9] 18 U.S.C. § 1151 states that "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

early federal perception of the inability of Indians and non-Indians to get along and corresponding erection of a barrier of non-intercourse. In addition to liquor, the policy of non-intercourse also regulated such areas as trade, criminal conduct, and the sale of land involving Indians and non-Indians. In essence, a series of federal laws were enacted "to regulate trade and intercourse with Indian tribes."[10]

The general federal proscriptions against dispensing intoxicants in Indian country, 18 U.S.C. 1154,[11] and

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[10] See e.g. Francis Paul Prucha, *American Indian Policy in the Formative Years: Indian Trade and Intercourse Acts, 1790-1834* at 1-3, 43-50 (1962).

[11] 18 U.S.C. § 1154(a) provides that "(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years or both. (b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors

possessing intoxicants in Indian country, 18 U.S.C. 1156,[12] remained unchanged until they were amended in 1953 by the Congressional enactment of 18 U.S.C. § 1161. 18 U.S.C. § 1161[13] is essentially local option legislation permitting Indian tribes, with the approval of Secretary of

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into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attache, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian. (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquors [sic] laws thereto."

[12] 18 U.S.C. § 1156 provides that "Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possess intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto."

[13] 18 U.S.C. § 1161 provides that "The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of

Interior, to regulate the sale of liquor on the Reservation, so long as state law is not violated. The Cheyenne River Sioux Tribe has pursued this local option and has promulgated a tribal Alcohol Beverage Code Law, which has been approved by the Secretary of Interior.[14]

The Defendants/Appellants in this action do not deny this basic statement of the law. Rather, they focus on the provisions of 18 U.S.C. §§ 1154 and 1156, which contain identical exemptions that "the term Indian country as used in this section does not include fee patented land in non-Indian communities or rights of way through the reservation." Therefore, the heart of issue is joined in the question of statutory interpretation concerning the relationship of these 'exemptions' to the federal delegation of tribal regulatory authority set out in 18 U.S.C. § 1161.

This legislative knot may be parsed as follows. First, the context may be understood in the following manner. The express purpose of 18 U.S.C. § 1161 was to eliminate the discriminatory effects of federal laws prohibiting Indians from purchasing alcoholic beverages.[15] The method that the Congress chose to effectuate this purpose was to end the federal prohibition and to delegate regulatory authority to both the state and the tribe. The 'non-Indian communities' exemptions of 18 U.S.C. §§ 1154 and

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Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

[14] See *supra* footnote 1.

[15] Public Law 277, codified at 18 U.S.C. § 1161, was entitled "An Act to Eliminate Certain Discriminatory Legislation Against Indians in the United States."

1156 were, on one hand, expressly limited to Indian country, while on the other hand the exemptions were also suspended within Indian country, if the transaction was in accordance with the laws of both the state and tribe.

This plain meaning reading makes eminent good sense with respect to both its prongs. Prior to the adoption of 18 U.S.C. § 1161, 18 U.S.C. § 1154 reached beyond Indian country to any Indian who held a trust allotment or was otherwise a 'ward' of the federal government under the charge of any Indian superintendent regardless of his or her whereabouts[16] 18 U.S.C. § 1161 explicitly limited the reach of 18 U.S.C. § 1154 to Indian country. Once in Indian country, however, the exemptions of both 18 U.S.C. §§ 1154 and 1156 were subject to suspension in Indian country, itself, if the controverted act was not in compliance with state law and an appropriate tribal ordinance. This latter situation is the case before us.

Despite this straightforward interpretation, Defendants/Appellants argue for a different statutory construction. They claim that 18 U.S.C. § 1161 is never even reached because 18 U.S.C. § 1154 and 1156 are dispositive. Defendants/Appellants claim that since they are located on fee land within non-Indian communities,[17] and

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[16] *See e.g.*, Felix Cohen, *Handbook of Federal Indian Law* (1982 Ed.) at 307

[17] It is to be noted that the trial court made no finding on this issue and in fact, it explicitly refused to receive evidence on the question believing it not to be germane to its inquiry. For purposes of this appeal, this Court will assume, but will not find, the Defendants/Appellants to be located on 'fee land' in 'non-Indian communities.' Such a finding would normally be a

therefore within the purview of 18 U.S.C. §§ 1154 and 1156, 18 U.S.C. § 1161 does not apply because it does not reach the exemptions created by 18 U.S.C. 1154 and 1156. This argument is difficult to track. The whole point of 18 U.S.C. 1161 was to change the discriminatory effects of 18 U.S.C. §§ 1154 and 1156 and since there is no language of limitation in 18 U.S.C. § 1161, it reaches all of 18 U.S.C. §§ 1154 and 1156 including the *exemptions*. The reading urged by the Defendants/Appellants is simply not supported by the language or intent of the statute. The discriminatory effect against Indians sought to be alleviated by the statute would hardly be achieved if (discriminatory) policies on fee land in non-Indian communities on the reservation were beyond the purview of the statute in the first instance.

It is also to be noted that the reach of 18 U.S.C. § 1161 applies to *all* of Indian country which as defined at 18 U.S.C. § 1151 subsumes all land including rights of way and fee patented land within the reservation. In addition, this Court's reading of the statute yields a uniform result, rather than the impracticalities and difficulties of 'checkerboard' jurisdiction.[18] See e.g., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 630 (1977) (Marshall, J. Dissenting).

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question of fact. *If* such a finding is a necessary predicate to this Court's decision, it will have to be made by the trial court on remand. Such remand is not, however, required in this case.

[18] The decision of the Cheyenne River Sioux Tribe to regulate alcohol distribution and consumption (including provisions to tax and to set up a comprehensive treatment program) is an admirable legal and ethical commitment to deal with a significant social problem on the reservation. Such action will be severely frustrated if there are pockets of exemptions to the tribe's (federally authorized) authority.

2. The Case Law

Not surprisingly, there is only limited case law in this specific area and none of it really engages the question of the relationship of the 'fee patented land' in 'non-Indian communities' exemptions of 18 U.S.C. §§ 1154 and 1156 and the federal delegation to tribes (jointly with the state) to regulate the sale of liquor in Indian country set out at 18 U.S.C. § 1162. The Eighth Circuit in both *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1985) and *United States v. Mission Golf Course, Inc.*, 716 F.2d 907 (8th Cir. 1983) simply proceeded to the question of whether the retail liquor establishments (conceded to be on fee patent land) were located in 'non-Indian communities.' The *Morgan* case, which involved activity on the Standing Rock Sioux Reservation, answered in the affirmative and ruled against tribal regulation, while the *Mission Golf Course* case, which involved activity on the Rosebud Sioux Reservation, answered in the negative and ruled in favor of tribal regulation.

The U.S. Supreme Court in *United States v. Mazurie*, 419 U.S. 544 (1974) also answered the question in the negative concerning retail liquor activity on the Wind River Reservation in central Wyoming and ruled in favor of tribal regulation. The Court's opinion focused primarily on the issues of whether the term 'non-Indian communities' at 11 U.S.C. § 1154(c) was unconstitutionally vague and whether the Congress may properly delegate regulatory authority of the retail disposition of alcoholic beverages to Indian tribes. The Court decided both these issues in the affirmative, but it did not undertake the statutory construction issue posed by the meaning assigned to 18

U.S.C. §§ 1152 and 1156, on the one hand, and 18 U.S.C. § 1161 on the other.

The U.S. Supreme Court revisited this area of Indian Law in 1983 in the case of *Rice v. Rehner*, 463 U.S. 713 (1983). The primary issue in *Rice v. Rehner* was whether the state of California could require a federally licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off premises consumption. The Court answered this question in the affirmative, but more importantly, for our purposes, the Court made it clear that its decision rested on the foundation "that Congress has delegated authority to the States as well as the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." *Rice* at 715. This statement is immediately footnoted to the definition of Indian country found at 18 U.S.C. § 1151. *Id.* There is no discussion or mention of the 'exemptions' found at 18 U.S.C. §§ 1154 and 1156.

This declaration, which is repeated again in *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989), in the context of a hotly contested claim involving the issue of tribal-state zoning authority over non-Indian property, does not strike this Court as an idle or careless use of language. What is particularly compelling in this instance is that 18 U.S.C. §§ 1151 and 1161 are cited by the Supreme Court as an example of Congressionally delegated regulatory authority to tribes over *fee* lands. *Brendale* at 428. No mention is made of 18 U.S.C. §§ 1154 or 1156. This Court is in accord with these findings and analysis the U.S. Supreme Court and therefore holds that the tribe's delegated authority to regulate the sale of

liquor in Indian country as set out in 18 U.S.C. § 1161 is *not* subject to the exemptions that appear at 18 U.S.C. §§ 1151 and 1154.

As to the related question of *independent* tribal regulatory authority over the dispensation of alcoholic beverages in Indian country, this claim is effectively mooted by the extensive federal statutory scheme currently in place. Should Congress repeal this scheme, the issue of independent tribal authority would be affirmatively joined. Until that time, this Court reserves consideration and analysis of that important question.

C) Trial Judge's Failure to Recuse

This issue has two components – one procedural and one substantive. The procedural question focuses on what is the applicable procedure to be followed when an affidavit of prejudice is filed against the trial judge. The substantive question centers on delineating the proper grounds for recusal. Both sides err in the discussion of the procedural issue by concentrating their attention on Section 1-2-5(2)[19] of the Cheyenne River Law and Order Code. As this Court has recently made clear in case of *In*

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[19] Section 1-2-5(2) provides that "Any party to a legal proceeding may request a change of assignment of judges to hear the proceeding by filing a written Affidavit of Prejudice giving sufficient, reasonable grounds why the judge assigned should not hear the case. Such affidavit shall be presented to the Judge assigned to hear the case who shall rule on the sufficiency of the affidavit, and, if sufficient, either disqualify himself or turn the affidavit over to the Chief Judge or some other judge for a decision as to whether a different Judge should be assigned.

the Interests of J.H.,[20] # 91-023-A, the appropriate procedural standard for the recusal of a trial judge is found at Rule 33(b)[21] of the Cheyenne River Rules of Civil Procedure *not* Section 1-2-5(2) of the Law and Order Code. The rationale supporting this choice lies in the greater coherence and specificity of Rule 33(b), when compared to Section 1-2-5(2) *J.H.* at 5-6.

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[20] *In the Interests of J.H.* was decided on October 8, 1991, several weeks *after* the instant case was argued before this Court.

[21] Rule 33(b) provides that "Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exits, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him), which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

Rule 33(b) requires a trial judge who questions the sufficiency of the supporting affidavit to certify the question of sufficiency to another judge, which judge shall pass on the sufficiency of the affidavit. If the trial judge does not question the sufficiency of the supporting affidavit, another judge must be called in to hear the case. Clearly, this process was not followed in this case. The trial judge, who obviously did question the sufficiency of the affidavit, should have certified the question of sufficiency to another judge. The pertinent question now becomes whether this 'procedural' flaw undermines the integrity of the resulting decision.

The answer to this question is related, in part, to the substantive criteria applied in determining questions of sufficiency. In this regard, Section 1-2-5(2) and Rule 33(b) are a good deal more similar than they are in their procedural requirements. Section 1-2-5(1), specifies grounds for disqualification as including 'direct interest,' 'relative by blood' or not being able 'to render a good decision.' Rule 33 (b) speaks of 'bias or prejudice.' These differences are not in conflict, but rather constitute equivalent terms or phrases indicating a basic inability to be fair. *J.H.* at 6. In addition, Rule 33(c)[22] mandates that the facts alleged in the affidavit of prejudice are – for purposes of disqualification – assumed to be true and there is no hearing to determine their ultimate validity.

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[22] Rule 33(c) states that " 'sufficiency' for the purpose of this rule means whether the affidavit sets forth facts which, if rue [sic], would warrant a disqualification of a judge. There shall be no hearing or other inquiry as to whether the facts as stated in the affidavit are indeed true, so as to preserve the dignity of the court and avoid the hint of impropriety."

In the instant case, the recusal issue is further exacerbated by the issue of timeliness. The Defendants/Appellants' affidavit of prejudice was filed in June, 1990 approximately two years *after* this action began. In addition, the affidavit alleges no 'prejudice' in the instant lawsuit itself.[23]

The Defendants/Appellants raise several distinct claims on appeal relative to the issue of recusal. They may be summarized as follows: (1) The absence of a constitutional separation of powers provided in the Cheyenne River Sioux Tribal Constitution renders the trial judge subject to 'undue influence' by the Cheyenne River Sioux Tribal Council; (2) The trial judge and plaintiff's attorney working together on a tribal code revision project involving questions of jurisdiction constitutes 'bias' against the Defendants/Appellants and (3) The trial judge 'badgering' attorneys in other cases involving jurisdiction over non-Indians. This claim will be analyzed within the framework of an abuse of discretion standard of review. *Philips v. Joint Legislative Comm.*, 637 F.2d 1014, 1021 (5th Cir. 1981). The abuse of discretion standard recognizes that a trial court's discretion is broad, but it is not uncontrolled. It must be soundly and substantially based upon the evidence. *Owen v. Owen*, 351 N.W.2d 139 (S.D. 1984).

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[23] The Defendants/Appellants' Affidavit of Prejudice makes no mention of the claim of the trial judge's allegedly improperly granting (though subsequently denying) plaintiff's motion for a preliminary injunction. This allegation is raised for the first time on appeal and therefore is *not* timely for this Court's consideration. See *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988).

The Defendants/Appellants' first recusal claim based on the absence of a tribally constitutionalized separation of powers may be readily dispatched. Defendants/Appellants cite no authority indicating that such a claim has ever been authorized by *any* court. Its implications, if logically applied, are quite astounding. In *any* action brought by the tribe, the tribal judge is subject to recusal, but, of course, his or her replacement is also subject to recusal for the same reasons. Where does it end? Such claims appear tendentious in the extreme with very little thought about the implications of such arguments, which could culminate in the tribe having *no* standing in its own tribal court. Of course, *actual* (not claimed here) overreaching by the Tribal Council relative to a trial judge's autonomy would potentially subject a tribal judge to recusal, as well as raise legal questions of the first order for this Court about the relationship of the judiciary to the legislative and executive branches of tribal government. In addition, such overreaching would raise fundamental questions of due process. See e.g. *United States v. Mazurie*, 419 U.S. 544 (1975) and 25 U.S.C. § 1302(8).

As for the code revision claim, members of the federal judiciary (including the U.S. Supreme Court) as well as members of many state judiciaries participate in state and federal code revision. Again, Defendants/Appellants cite no authority to support their argument and the settled law is to the contrary. As the U.S. Supreme Court noted in *Mistretta v. United States*, 488 U.S. 361 (1989) the fact that federal judges participate in formulating federal sentencing guidelines does not bar them from hearing challenges to the guidelines. Moreover, "[i]t is well established that the mere fact that a judge holds views on law

or policy relevant to the decision of a case does not disqualify him from hearing the case," *Southern Pac. Communications v. A.T.&T.*, 740 F.2d 980, 990 (D.C. Cir. 1984).

On the specific issue of the trial judge's 'bias or prejudice,' the Defendants/Appellants' contentions are seriously flawed. For example, Canon 3 or the ABA Code of Judicial Conduct, which governs requests for disqualification of judges, provides that a judge must have a personal bias or prejudice concerning a *party*. The Defendants/Appellants do not allege judicial bias or prejudice toward any party in *this* case, but rather in *other* cases (concerning Indian – non-Indian jurisdiction) and involving *other* parties. In addition, this Court notes that, Mr. Steven Aberle, counsel for several Defendants/Appellants in this matter, in whose brief this argument is made, has appeared in at least two recent cases, namely *Thorstenson v. Cudmore*, (# 88-018-A) and *Gesinger v. Gesinger*, (# 91-002-A) before this Court involving issues of jurisdiction in Indian – non-Indian lawsuits. In neither of these cases did Mr. Aberle even allege the presence of 'prejudice' on the part of the trial judge. In at least one of these cases, namely *Gesinger v. Gesinger*, the trial judge was the same trial judge as the one in the instant case. In addition, the mere 'badgering' of counsel even *if* present in the case at bar is insufficient grounds for recusal. As noted by the Eleventh Circuit, for example, "friction between court and counsel does not constitute bias." *Hamm v. Board of Regents*, 708 F.2d 647, 651 (11th Cir. 1983).

This Court also notes that its ruling on the primacy of Rule 33(b) over Section 1-2-5(2) of the Code for the apposite *procedural* guidelines in judicial disqualification

issues does not require a reversal in the instant case. This appeal has reviewed Defendants/Appellants substantive recusal claims within the appropriate abuse of discretion standard and finds no abuse of discretion.

D) Hearsay Issue

The Defendants/Appellants claim that the trial court erred in admitting certain hearsay testimony at trial. Specifically, they allege that the admission of an excerpt from the trial transcript of the federal prosecution of Silas High Elk for vehicular homicide was hearsay and did not meet the requirements of the 'unavailable witness' exception set out at SDCL § 19-16-35[24] and made applicable in

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[24] SDCL § 19-16-35 provides that "A statement not specifically covered by any of §§ 19-16-30 to 19-16-34, inclusive, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by § 19-16-4 if the declarant is unavailable as a witness and if the court determines that:

(1) the statement is offered as evidence of a material fact;

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this section unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

tribal court through Rule 18[25] of the Cheyenne River Rules of Civil Procedure. In particular, Defendants/ Appellants claim that the Plaintiff did not provide the requisite 'notice' required by SDCL § 19-16-35.

Yet by its own terms, SDCL § 19-16-35 only applies if the statement at issue is "*not* specifically covered by any of §§ 19-16-30 to 19-16-34." The statement at issue here, however, is a classic 'admission against interest' as defined at SDCL § 19-16-32.[26] Mr. High Elk's statement that he was drinking on the day of the fatal automobile accident clearly was a declaration against his penal interest and would be admissible if the declarant was unavailable as a witness. It is uncontested that Mr. High Elk was unavailable due to his incarceration in a federal penitentiary outside the (subpoena) jurisdiction of the trial court.

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[25] Cheyenne River Rule of Civil Procedure 18 (a) provides that "At all hearing and trials, the testimony of witnesses shall be taken orally under oath, unless otherwise provided in these rules. All evidence admissible under the new South Dakota Rules of Evidence or as specified in this Law and Order Code shall be admissible and the competency of witnesses to testify shall be similarly determined."

[26] SDCL § 19-16-32 provides that "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made that statement unless he believed it to be true, is not excluded by § 19-16-4 if the declarant is unavailable as a witness. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Therefore, Defendants/Appellants' reliance on SDCL § 19-16-35 is entirely misplaced.

In any event, the admission of this testimony was clearly harmless in that it was merely cumulative of other evidence in the record. See *e.g., F.T.C. v. Amy Travel Services, Inc.*, 875 F.2d 564, 576 (7th Cir. 1989). More importantly, however, is the fact that this evidence is clearly *irrelevant* to the determinative legal issues involving jurisdiction and the federal delegation of regulatory authority to the tribe.

IV. CONCLUSION

In sum, this Court finds that the Cheyenne River Sioux Tribe is *not* an 'Indian' within the meaning of Cheyenne River Sioux By-Law V1(c), that the federal government has delegated broad regulatory authority to the tribe in the area of alcohol beverage control sufficient to reach the conduct and activities of each of the defendants/appellants, that the trial judge (despite following the incorrect procedure) did not improperly fail to recuse herself, and that it was not improper (while also being both harmless and irrelevant) to admit the hearsay statement of Mr. High Elk as a proper hearsay exception, namely an 'admission against interest.'

For all the following reasons, the decision of the trial court is hereby affirmed.

IT IS SO ORDERED.

James Abourezk
Associate Justice

Everett Dupris
Associate Justice

Frank Pommersheim
Chief Justice

April 2, 1992

CHEYENNE RIVER SIOUX TRIBE v. ISABEL CITY PACKAGE LIQUOR, et al.

(Chy. Sx. Tr. Ct., Jan. 8, 1991)

Summary

In an action brought by the Cheyenne River Sioux Tribe to enforce its alcoholic beverage control ordinance and its business license ordinance against defendants who have not purchased either a tribal liquor license or a tribal business license as required by the two ordinances and who operate businesses located on fee land within the exterior boundaries of the Cheyenne River Sioux Indian Reservation, the Cheyenne River Sioux Tribes seeks to enjoin defendants from operating their businesses, which are all liquor establishments of various forms, until such time as the requisite permission of the Cheyenne River Sioux Tribal Council is obtained and licenses are purchased. The defendants assert that the Cheyenne River Sioux Tribe has no jurisdiction to impose any such licensing requirements and counterclaim for a permanent injunction enjoining plaintiff from pursuing the action and for costs and attorneys fees.

The Cheyenne River Sioux Tribal Court concludes as a matter of law that: (1) The U.S. Congress has expressly delegated to the Cheyenne River Sioux Tribe the authority to regulate liquor traffic on all lands within the exterior boundaries of the reservation under 18 U.S.C. § 1161; (2) the Cheyenne River Sioux Tribe has an express delegation of authority by virtue of article IV, section 1(i) of the tribal constitution to levy license fees on all persons doing business upon the reservation; (3) each defendant

has engaged in substantial consensual commercial dealings with the tribe and its members sufficient to subject each of them to the inherent civil authority of the Cheyenne River Sioux Tribe over non-Indian activities on fee lands under the standards set forth in *Montana v. United States*, 450 U.S. 565 (1981), which allow the tribe to regulate and license each of the defendants' liquor establishments pursuant to Ordinances 1 and 48; and (4) defendants' commercial distribution of alcohol on the reservation directly and adversely affects the political integrity, economic security, and health and welfare of the tribe and its members to an extent sufficient to allow the tribe to regulate their activities under Ordinances 1 and 48.

The Cheyenne River Sioux Tribal Court: (1) finds that the Cheyenne River Sioux Tribe has the authority to require all defendants to comply with the tribal ordinances; (2) permanently enjoins defendants from operating their business establishments within the exterior boundaries of the Cheyenne River Sioux Reservation unless they comply with all of the provisions of the ordinances; (3) holds that failure to comply with the ordinances will subject defendants both to the closure of their business establishments by the proper officials and to the forfeiture provisions of tribal law; (4) directs that the moneys currently being held in escrow pending resolution of the dispute are ordered to be released to the Cheyenne River Sioux Tribe, together with all accrued interest thereon; and (5) denies defendants' counterclaims.

Full Text

Before BROWN, Chief Judge

BROWN, Chief Judge

Memorandum Opinion

This action was brought by the Cheyenne River Sioux Tribe to enforce its alcoholic beverage control ordinance (Ordinance No. 48) and its business license ordinance (Ordinance No. 1) against the above-named defendants, who admittedly have not purchased either a tribal liquor license or a tribal business license as required by these two ordinances. The controversy involves the civil regulatory authority of the Cheyenne River Sioux Tribe to impose liquor and business licenses fees and regulations on these defendants, most of whom are non-Indians whose businesses are located on fee land within the exterior boundaries of the Cheyenne River Sioux Indian Reservation. The tribe seeks to enjoin these defendants from operating their businesses, which are all liquor establishments of one form or another, until such time as the requisite permission of the tribal council is obtained and the licenses are purchased. The defendants assert that the Cheyenne River Sioux Tribe has no jurisdiction to impose any such licensing requirements and counterclaim for a permanent injunction enjoining the plaintiff from pursuing this action and for costs and attorney fees.

There are only two methods by which tribal civil regulatory authority can be asserted over non-Indian activities on fee lands within the reservation. Authority

must either be expressly delegated to the tribe by Congress or inherent in the tribal government itself by virtue of its status as a sovereign entity. After extensive pre- and post-trial motions, briefs, and discovery, this matter proceeded to trial on July 30-August 2, 1990, with the plaintiff being represented by Messrs. Scott McElroy, Mark Van Norman, and Steven Emery; the Isabel, Firesteel, and Timber Lake defendants being represented by Mr. Steve Aberle; and the Dupree defendants being represented by Mr. Kenn Pugh.

Having carefully considered all of the contentions involved, the evidence and testimony presented, pre- and post-trial memoranda on the various issues and having researched the applicable law, the court hereby enters the following memorandum opinion, which shall constitute and incorporate its findings of fact and conclusions of Law in this matter.

Background

I. Jurisdiction of the Tribal Court

The defendants steadfastly object to the jurisdiction of the Cheyenne River Sioux Tribal Court to entertain this cause of action. The jurisdiction of the tribal court is subject to any controlling federal law on the particular controversy since federal Indian law is primary and preempts any tribal law to the contrary. Tribal court jurisdiction can further be limited by territorial considerations and express restrictions which may exist within the tribal law itself. A careful examination of any limits on this court's jurisdiction must necessarily involve questions of territorial, personal, and subject matter jurisdiction in

relation to federal Indian law, treaties, the Constitution and By-laws, Law and Order Code and case law of the Cheyenne River Sioux Tribe.

A. Territorial Jurisdiction

The Cheyenne River Sioux Indian Reservation lies entirely within Dewey and Ziebach counties and encompasses in excess of 2,800,000 acres. The Treaty of April 29, 1868 (the Fort Laramie Treaty) established the boundaries of the Great Sioux Nation within the aboriginal territory of the four bands of the Sioux Nation which later became the Cheyenne River Sioux Tribe.[1]

The division of the Great Sioux Reservation by the Act of March 2, 1889 (25 Stat. L. 888) into six smaller reservations created a reservation specifically for these four bands, which subsequently organized as one "tribe" under the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. § 461 *et seq.* The Cheyenne River Sioux Tribe Constitution and By-Laws, which were authorized by the Indian Reorganization Act, specifically state in article I that the "jurisdiction of the Cheyenne River Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which

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[1] The original four distinct sovereign bands, the Minnecoujou, Siha Sapa, Oohenunpa and Itazipco were part of the "Sioune," a geopolitical nation which initiated formal political relations with the United States in a treaty signed on July 5, 1825. In the Fort Laramie Treaty of 1868, these bands were guaranteed a permanent reservation within their original territory, this reservation becoming known as the "Great Sioux Reservation."

are described by the Act of March 2, 1889 (25 Stat. L. 888). . . . " It is well-settled that the exterior boundaries of the Cheyenne River Sioux Reservation were not diminished by the homesteading allowed by the Act of May 29, 1908, 35 Stat. 460 (1908). *Solem v. Bartlett*, 104 S. Ct. 1161, 1165, 1166, 465 U.S. 463, 79 L.Ed.2d 443 [11 Indian L. Rep. 1007] (1984).[2] It is uncontested that each of the defendants' establishments are located within the exterior boundaries of the reservation; thus, the Cheyenne River Sioux Tribe unquestionably has territorial jurisdiction over this cause of action.

B. Personal Jurisdiction

While not denying that this court has territorial jurisdiction to determine this controversy, the defendants maintain that the organic law of the tribe (its constitution and bylaws) prohibits tribal court jurisdiction over them because they, as non-Indians, have not stipulated to suit in tribal court as required by article V, § 1(c) of the bylaws. Article V of the bylaws is the provision which

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[2] In *Solem*, 104 S. Ct. at 1165-66, the Court stated that "Indian Country" includes land held in fee by non-Indians within the reservation boundaries. Further, the Court determined that:

> only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

empowers the tribal council to provide for the establishment of a tribal court upon the reservation. Section 1(c) of article V states in pertinent part:

> This Court shall have jurisdiction over all Indians upon the reservation and *over such disputes or lawsuits as shall occur between Indians and non-Indians where such cases are brought before it by stipulation of both parties. . . .* (emphasis added).

Defendants further argue that article IV, § 1(k) of the constitution prohibits suits against non-Indians since that provision establishes courts only for the adjudication of disputes arising among members of the tribe and also that the limitation on the powers of the tribal council in article IV, section 1 makes the quoted bylaw provision applicable to the tribal government itself, thus rendering this court's jurisdiction over the controversy unconstitutional. The court, however, in its Order entered on February 6, 1989, specifically found that the stipulation provision applies only to individuals and not to the tribal governing body itself.[3] (*See also Cheyenne River Sioux Tribe v. Key*, C-376-89, entered on January 3, 1990; Accord, *Cheyenne River Sioux Tribe v. Alley, Hertel*, C-375-89, entered on February 6, 1990).

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[3] This court further determined in its February 6, 1989 Order that because there is a presumption of constitutionality to every legislative enactment, all doubts concerning it must be resolved in favor of constitutionality, if to do so is reasonable and possible. The court found that it was unlikely that the drafters of the tribal constitution and bylaws intended to deprive the tribal council of the authority to invoke the jurisdiction of its own court to enforce a validly enacted ordinance.

Assuming *arguendo* that a stipulation was necessary, the constitutional requirement would still be met. This court has held on numerous occasions that an overt, express stipulation is not required; rather, an implied consent to jurisdiction can be gleaned from the conduct of the parties. A consensual business relationship is deemed sufficient for this purpose. *See Dale v. Lind*, C-321-88 (1989); *see also Gesinger v. Dupris*, C-153-88 (1989); *Gesinger v. Gesinger*, C-071-90 (1990); *Accord: Ducheneaux v. First Federal Savings & Loan*, 84-013-A (1985); *But see Hunt v. Schauer*, C-294-89 (1990). Thus, the tribal court has the power to exert personal jurisdiction over these non-Indian defendants.

C. Subject Matter Jurisdiction

Defendants also argue that the Cheyenne River Sioux Tribal Court lacks subject matter jurisdiction over this action since their establishments are located in "non-Indian communities" within the meaning of 18 U.S.C. § 1154[4] and argue that when the alcoholic beverage control ordinance was published in the *Federal Register* pursuant to law, the Secretary's reference to exceptions to the

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[4] 18 U.S.C. § 1154(c) (intoxicants dispensed in Indian Country) states: "The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto." The same limited definition of "Indian country" appears in 18 U.S.C. § 1156 (intoxicants possessed unlawfully).

tribe's jurisdiction contained in 18 U.S.C. § 1154(c) effectively deprived the tribe of the authority to apply its liquor control ordinance to them.[5]

This court, in deciding both a motion for summary judgment and a motion *in limine* filed by the plaintiff, specifically found by Orders entered April 4, 1989 and July 14, 1989 respectively, that because 18 U.S.C. § 1161[6]

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[5] The Secretary's certification of the alcoholic beverage control ordinance contained a caveat that certain sections make the ordinance applicable to all lands within the reservation boundaries. The Secretary stated:

> There is no reference to the two exemptions to the Tribe's jurisdiction as described in 18 U.S.C. § 1154(c). However, the existence of land entitled to either of the two exemptions, fee patented land in non-Indian communities or rights-of-way through Indian reservations, is a factual question to be decided by the courts.

The Secretary's only duty is to certify that the ordinance was duly passed by the Cheyenne River Sioux Tribe and publish it in the *Federal Register*. Article IV, § 2 of the Cheyenne River Sioux Tribe Constitution sets forth the manner of review by the Secretary of any ordinance which is subject to his review. The Secretary could have disapproved of the ordinance but did not and has therefore acquiesced in its provisions, including its applicability to all lands within the reservation boundaries.

[6] 18 U.S.C. § 1161 – Application of Indian Liquor Laws – states:

> The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified

incorporates the definition of "Indian country" contained in 18 U.S.C. § 1151[7], the racial character of the communities in which defendants' businesses are located is irrelevant. The limited definition of Indian Country found in 18 U.S.C. § 1154(c) would apply if this action involved violation of federal liquor laws in Indian Country; however, this case turns on the source of plaintiff's *civil regulatory authority* over the activities of non-Indians on fee lands. Thus, the definition of Indian Country in section 1151 is the only one applicable to the instant case, and this court has subject matter jurisdiction, since it is undisputed that defendants' businesses are located within the reservation boundaries.

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by the Secretary of the Interior and published in the Federal Register.

[7] 18 U.S.C. § 1151 – Indian Country Defined –
Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

II. Request for Reassignment of Judge

Some two years after the initiation of this action, the defendants filed objections to the matter being heard by the Chief Judge of the Cheyenne River Sioux Tribe, citing their belief that the chief judge could not be objective because, among other things, she would be subject to removal by the tribal council should a decision adverse to the tribe be rendered. In a lengthy opinion entered on July 13, 1990, this request was denied as not being legally sufficient to warrant disqualification of the judge and further, that the request was frivolous and without merit.[8]

III.

As previously stated, both parties have filed pre- and post-trial memoranda on the issues before the court. At a lengthy bench trial, the court heard the testimony of 23

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[8] Numerous hearings prior to trial were held in this cause and for the most part, one or more of the defendants failed to appear and they continually ignored orders from this court concerning discovery, etc. The defendants then attempted to claim prejudice and lack of impartiality on the part of the chief judge, when in fact it was their own consistent failure to appear to argue their position which put the court in the position of being able to rule only for the plaintiff. The affidavit of prejudice was, in the opinion of the court, merely another attempt by the defendants to deny the jurisdiction of this court and to force the court to change the original jurisdictional decision entered on February 6, 1989. This court specifically determined in its July 13, 1990 Order that the filing of the affidavit of prejudice constituted a waiver of any objections to the jurisdiction of the tribal court over this matter.

witnesses and received 29 exhibits into evidence. In addition to the factual and procedural background set forth herein, the court makes the following specific findings of fact, notwithstanding any additional findings which appear in subsequent sections of this opinion:

1. Plaintiff Cheyenne River Sioux Tribe is a federally recognized tribe of Indians having accepted the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).

2. All defendants operate liquor establishments within the exterior boundaries of the Cheyenne River Sioux Reservation.

3. Defendants have not obtained the appropriate tribal business and liquor licenses which are required for such establishments pursuant to Cheyenne River Sioux Tribe Ordinance No. 1, governing the tribal business licenses and Cheyenne River Sioux Tribe Ordinance No. 48, the Alcoholic Beverage Control Law.

4. Cheyenne River Sioux Tribe Ordinance Nos. 1 and 48 were enacted by the tribal council and were subsequently certified and approved by the Secretary of the Interior. Ordinance No. 48 was duly published in the *Federal Register* on June 2, 1988.

5. This court has jurisdiction over this matter, pursuant to the Constitution and By-Laws and the Law and Order Code of the Cheyenne River Sioux Tribe.

6. Pursuant to article I of the Constitution of the Cheyenne River Sioux Tribe and to section 1-4-1 of the Law and Order Code, the jurisdiction of the tribe and of the tribal court extends to the territory within the exterior

boundaries of the reservation, as described in section 4 of the Act of March 2, 1889 (25 Stat. L, 888) and to such other lands without such boundaries as may hereafter be added to the reservation of held in trust for the tribe under any law of the United States or otherwise.

7. Defendants' business establishments, within the confines of the reservation boundaries as aforesaid, are within the territorial jurisdiction of the Cheyenne River Sioux Tribe.

8. Article V, section 1(c) of the bylaws, which extends the jurisdiction of the court to cases between Indians and non-Indians with the proviso that both parties stipulate to such jurisdiction, applies only to cases brought by individual plaintiffs and does not apply to cases brought by the tribe. Stipulation of the parties is therefore unnecessary for this court to exercise its jurisdiction over this matter.

9. Article V, section 1(d) of the bylaws, which provides for the establishment and jurisdiction of the tribal court, states that the "duties and jurisdiction of this Court shall be more fully described by appropriate by-laws and ordinances."

10. Pursuant to this section of the constitution, the tribe enacted section 1-4-1 of the Law and Order Code, further defining the jurisdiction of the tribal court. That section declares it to be the policy of the tribe that it:

> provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe as set forth in Section 4 of the Act of March 2, 1889 (25 Stat. L. 888) with an effective means of redress in both civil and criminal cases

against members and non-Tribal members who, through either their residence, presence, business dealings, other actions or failures to act or other significant minimum contacts with this Reservation and/or its residents commit criminal offenses against the Tribe or incur civil obligations to persons or entities entitled to the Tribe's protection. . . . The jurisdictional provisions of this Code, to ensure maximum protection for the Tribe, its members, and other residents of the Reservation, should be applied equally to all persons, members and non-members alike.

11. Pursuant to section 1-4-3 of the Law and Order Code, the tribal court has personal jurisdiction over:

A. Any person residing, located or present within the Reservation for:

1. Any civil cause of action; or. . . .

B. Any person who "transacts, conducts, or performs any business or activity within the Reservation, either in person or by an agent or representative, for any civil cause of action or charge of criminal offense for any act expressly prohibited by the Code or other ordinance of the Tribe arising from such business activity." [The provisions quoted above which relate to criminal offenses are not applicable to non-Indians pursuant to the United States Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 65 L.Ed.2d 209 (1978). The Law and Order Code covers this eventuality by providing in section 1-8-7(5) that the provisions are severable and the unconstitutionality of any provision does not render the entire Code void.]

12. Pursuant to article IV, section 1(i) of the constitution, the tribal council is authorized and empowered to levy license fees subject to review by the Secretary of the Interior, upon non-members doing business on the reservation. This provision specifically delegates to the Cheyenne River Sioux Tribe the authority to enact and enforce Ordinance 1.

13. Article IV, section 1(k) of the constitution duly authorizes and empowers the tribal council to promulgate ordinances for the purpose of safeguarding the peace and safety of residents of the reservation.

14. Cheyenne River Sioux Tribe Ordinance No. I, requiring both members and non-members to obtain a business license from the tribal council, is a valid exercise of the tribe's constitutional authority, and is validly operative and in effect, having been enacted by the tribal council and certified and approved by the Secretary of the Interior.

15. 18 U.S.C. § 1161 authorizes tribal governments to adopt ordinances regulating the introduction, sale, and use of intoxicating liquor on the reservation, provided that the ordinance is in accord with state law and is certified by the Secretary of the Interior and published in the Federal Register.

16. Cheyenne River Sioux Tribe Ordinance No. 48 requiring any person operating a liquor establishment on the reservation to obtain a liquor license from the tribal council, is a valid exercise of plaintiff's constitutional authority, and is in effect, having been enacted by the tribal council, certified by the Secretary of the Interior

and published in the Federal Register. Even if a determination was made that Ordinance 48 could not be enforced against these defendants, Ordinance 1 requires them to obtain a tribal business license before they legally conduct business on the reservation. Ordinance 48 incorporates these provisions of Ordinance 1.

Issues Presented[9]

I. Does the Cheyenne River Sioux Tribe, under 18 U.S.C. § 1161, Have an Express Delegation of Authority from Congress to Enforce Its Alcoholic Beverage Control Ordinance No. 48 Against Non-Indians on Fee Lands In Indian Country?

II. Notwithstanding Any Express Delegation of Authority Under 18 U.S.C. § 1161, Does the Cheyenne River Sioux Tribe Have the Inherent Authority

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[9] Despite the fact that these three issues were specifically set forth in this court's Order dated July 14, 1989 as the factual questions to be determined and despite a direct order from the court at the close of the trial to submit post-trial memoranda relating all the testimony, evidence, and exhibits to these issues, and despite a further direct order from the court to submit proposed findings of fact, only the plaintiff fulfilled its obligation by addressing each issue and submitting the required proposed findings of fact. None of the defendants addressed issues I and III in the post-trial brief and none submitted any findings of fact for the court to consider. The court, therefore, would be justified in finding for the plaintiff by waiver on both issues and imposing sanctions upon the defendants for their failure to obey the court's directive. However, in light of the importance of the issues to all parties, the court declines to enter such waiver and will proceed with an analysis of each issue according to the testimony, evidence and other matters in the court record.

by Virtue of its Sovereign Status to Enforce Its Alcoholic Beverage Control Ordinance No. 48 Against Non-Indians on Fee Lands Under the Standards Set Forth by the United States Supreme Court in *Montanu v. United States*, 450 U.S. 544 (1981)?

III. Does the Cheyenne River Sioux Tribe Have the Authority, Either Delegated or Inherent, to Enforce Its Business License Ordinance No. 1 Against Non-Indians on Fee Land?

Discussion of Arguments and Authorities

I. Express Delegation of Authority Under 18 U.S.C. § 1161 for Ordinance No. 48

With the passage of P.L. 277 in 1953, codified as 18 U.S.C. § 1161, Congress delegated authority to states and Indian tribes to "regulate the use and distribution of alcoholic beverages in Indian country." *Rice v. Rehner*, 463 U.S. 715, 103 S. Ct. 3291, 3293, 3294 [10 Indian L. Rep. 1057] (1983). Title 18, U.S.C. § 1161 states that federal liquor prohibition laws do not apply in any area not Indian Country nor to any transaction within Indian Country if the transaction is in conformity with both state law and an ordinance duly adopted by the tribe, certified by the Secretary of the Interior and published in the *Federal Register*. Defendants in the instant case are duly licensed by the state of South Dakota and are in compliance with state law, thus fulfilling the first requirement which 18 U.S.C. § 1161 imposes upon the sale of alcohol to Indians in Indian Country. Ordinance 48 was duly adopted by the Cheyenne River Sioux Tribe, certified by the Secretary and published in the *Federal Register*, as required. The question thus becomes, does the definition

of "Indian country" found in 18 U.S.C. § 1151 apply to section 1161 to create an express delegation of authority in the plaintiff for enforcing its liquor and business licensing laws against these defendants?

Title 18 U.S.C. § 1154 provides for federal prosecution for the introduction or sale of liquor in Indian Country. The history of that section is consistent with the exercise of tribal jurisdiction within the exterior boundaries of an Indian reservation. In 1948, section 1154 was included when the federal Indian liquor laws were codified into Title 18, United States Code. At that time, the laws prohibited the introduction of alcohol into Indian Country, as defined in section 1151 and also banned the sale of alcohol to Indians anywhere. In 1949, Congress amended the definition of "Indian country" in sections 1154 and 1156 to make them inapplicable to fee lands in non-Indian communities and rights-of-way through Indian reservations.[10]

No such amendment was made to any of the other Indian liquor laws. They remained subject to the definition of Indian Country in section 1151. The scope of the federal prosecutorial powers pursuant to section 1154 is subject to the limited definition contained therein but no such limitation applies to a tribe's civil authority to regulate liquor transactions on its reservation.

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[10] The establishments located in those areas were thought to have no impact on Indian reservations because, in any event, liquor sales to Indians were prohibited at any location.

The legislative history of section 1161 supports the broader reading of that section to authorize tribal authority throughout Indian Country, unimpeded by the limits of sections 1154 and 1156. Section 1161 was enacted to abolish discrimination against Indians and to halt the subjection of Indians to federal laws applicable only to them. S. Rep. No. 722 on H.R. 1055, 1953 U.S. Code Cong. & Ad. News, 2399, 2409 (67 Stat. 586). From early in the 19th century until 1953, the federal government prohibited the sale of liquor to Indians within the boundaries of any Indian reservation. The purpose of section 1161 was to enhance the rights of Indian tribes by removing federal obstacles to tribal decisions about liquor regulation on their reservations.

Indians with whom the United States had a trust relationship could not engage in liquor transactions anywhere prior to 1953, since under section 1154(a), such transactions were absolutely prohibited. Section 1154(a) also banned the introduction of liquor into Indian Country. The limited definition of Indian Country in section 1154(c) relates only to that ban and not to the prohibition of transactions involving Indians. Although liquor was allowed on the reservations on fee lands in non-Indian communities and rights-of-way through reservations, that exception did not affect tribes because the prohibition in the first part of section 1154(a) banned Indians from engaging in liquor traffic in those areas.

Congress' intent to delegate authority to regulate liquor traffic to tribes as including fee land and rights-of-way is apparent when the legislative history behind the enactment of 18 U.S.C. § 1161 is examined. Section 1161 must be considered in context of the historical regulation

of Indian liquor transactions. The section has two distinct parts: the first addresses Indian liquor transactions outside Indian Country and the second separately deals with the question of liquor sales within Indian Country.[11]

In passing section 1161, Congress intended to remove both the federal prohibition on the sale and use of alcohol by and to Indians, which had been in effect since 1832, and to delegate concurrent jurisdiction to states and tribes to regulate such transactions in all of Indian Country. The first part of section 1161 was intended to eliminate the absolute prohibition on Indian liquor transactions to the extent that it applied to activities outside Indian Country. The rest of section 1161 was meant to alter the terms by which liquor transactions within Indian Country were regulated. Rather than an absolute ban, as had been done in section 1154, this portion of section 1161 permitted the introduction of liquor into Indian Country, provided it was accomplished in accord with both state and tribal law. Since the ban on

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[11] The complete prohibitions over liquor transactions with Indians are still in effect, subject to suspension conditioned on compliance with state and tribal law. Cohen, *Federal Indian Law* at 306-07 (1982 ed.). Thus, if the tribe were to rescind Ordinance 48, the absolute prohibition against selling liquor to Indians anywhere on the reservation would be reinstated. If this occurred, the defendants would be in violation of federal law concerning the dispensing of intoxicants to Indians if they sold liquor to any Indian on the reservation. Such violation would subject them to prosecution under section 1154(a). It appears that the defendants would argue that subsections (a) and (b) of section 1154 do not apply to them, but subsection (c) does. They cannot have it both ways.

Indians engaging in liquor transactions had been eliminated by the first part of section 1161, Indians outside Indian Country could engage in such transactions. However, Congress conditioned the terms of its permission as it applied within Indian Country. In Indian Country, as the statute expressly states, these transactions are subject to both tribal and state regulations. That is the only reading of section 1161 which fulfills Congress' express purpose of granting control over the activities of tribal members in Indian Country to the tribes themselves. If Congress had intended to apply the narrow definition of Indian Country contained in sections 1154 and 1156 to section 1161, it would not have made those sections inapplicable to section 1161.

Liquor transactions on Indian reservations have a significant impact off-reservation and thus are the subject of a valid state interest. Tribes also have a significant interest in the sale of liquor on fee lands because those sales have a significant and detrimental impact on the rest of the reservation. The congressional intent underlying section 1161 was to confer upon the states and Indian tribes parallel authority to protect their respective interests.[12]

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[12] The United States Supreme Court has held that by enacting section 1161, Congress intended to delegate to the tribes a portion of its own authority over liquor transactions on reservations. *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710, 42 L.Ed.2d 706 (1975). The Supreme Court in *Rice* also stated that it is "clear then that Congress viewed § 1161 as abolishing federal prohibition and as legalizing Indian liquor transactions as long as those transactions conformed with both tribal ordinance and state law. It is also clear that Congress contemplated that its

Tribes cannot effectively utilize this authority unless it extends to all lands within the reservation boundaries. Incorporating the definition of section 1151 and section 1161 was intended to avoid an impractical pattern of checkerboard jurisdiction. *See Seymour v. Superintendent*, 368 U.S. 351 (1962). A tribe's civil regulation or prohibition of liquor traffic on its reservation cannot be effective if there are islands of fee land to which the tribe's liquor control laws do not apply.[13]

The only reading of the entire federal statutory scheme to regulate liquor traffic with Indians which gives effect to all parts of that scheme is that the section 1151 definition of Indian Country applies to all liquor laws,

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absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves and to the states, which historically shared jurisdiction with the federal government in this area." *Rice*, 463 U.S. at 728-29. Further, section 1161 is a statute passed for the benefit of Indian tribes and as such, any ambiguities should be resolved in favor of the tribes. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

[13] The local option contained in section 1161 allows the tribe, if it so chooses, to restrict the sale of intoxicants to Indians on its reservation; if the tribe so chooses, then the "checkerboard jurisdiction" which would result from the reading of sections 1151 and 1161 urged by defendants would defeat this purpose. In 1953, the Cheyenne River Sioux Tribe enacted Ordinances 15 and 16 which concerned the sale of alcoholic beverages on the reservation. Those ordinances were archaic and were not updated nor included when the tribe enacted its comprehensive Law and Order Code in 1978. These old ordinances were not enforced against non-Indians and by their own terms, did not apply to fee lands. Ordinance 48 was enacted to modernize the tribe's regulatory scheme and broaden its application to all lands within the exterior boundaries of the reservation.

except sections 1154 and 1156. Unless section 1161 applies throughout all of Indian Country, its purpose to remove the prohibitions in sections 3113, 3488 and 3669 could not be fulfilled. Those prohibitions would continue to apply to fee lands and rights-of-way which would obviously frustrate congressional intent, as well as subject anyone violating these prohibitions to federal prosecution.

Further, the plain language of section 1161 clearly contains a delegation of authority to tribes to regulate liquor traffic on all reservation lands. Indeed the United States Supreme Court in *Rice* quotes the section 1151 definition of Indian Country as defining the geographic scope of the congressional delegation of authority. *Rice*, 103 S. Ct. at 3294. In *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. ___, 109 S. Ct. 2294, 106 L.Ed.2d 343 [16 Indian L. Rep. 1044] (1989) (plurality opinion), Justice White, joined by the Chief Justice and Justices Scalia and Powell, evidenced on [sic] the belief that the geographic scope of the congressional delegation of authority to regulate liquor traffic in Indian Country includes fee lands and rights-of-way within reservations, when he, albeit in dicta, cited 18 U.S.C. §§ 1151 and 1161 as examples of express delegation by Congress of authority over non-Indians. Judge Porter of the United States District Court, Central Division of South Dakota, in his memorandum opinion in the case of *State v. Ducheneaux and Miner*, [17 Indian L. Rep. 3138] (C-88-3049, entered on Aug. 21, 1990) also affirmed that Indian Country includes all land within the limits of the reservation, citing 18 U.S.C. § 1151 as authority for his statement. *Ducheneaux*, C-88-3049 at 20.

It is therefore the specific finding of this court that the Cheyenne River Sioux Tribe has an express delegation of authority from Congress under 18 U.S.C. § 1161 to enforce its alcoholic beverage control law (Ordinance 48) against these non-Indian defendants. The court hereby enters the following specific findings of fact, in addition to those set forth above:

1. The general civil jurisdiction of the Cheyenne River Sioux Tribe extends to all lands within "Indian country" as defined in 18 U.S.C. § 1151, which includes all lands within the exterior boundaries of the reservation, notwithstanding the issuance of any patent, and including rights-of-way through the reservation.

2. 18 U.S.C. § 1151 is contained in chapter 53 of Title 18 of the United States Code, which is comprised of §§ 1151-1165. Section 1151 defines "Indian country" as used throughout the chapter, "except as otherwise provided in §§ 1154 and 1156. . . . " Thus, the definition therein, by the express terms of section 1151, applies to every section in chapter 53, *except* sections 1154 and 1156, and therefore, also applies to section 1161, which is the express delegated authority from Congress for Ordinance 48.

3. The more limited definition of "Indian country" found in sections 1154(c) and 1156, which excludes rights-of-way and fee patented lands in non-Indian communities within the reservation, applies only to federal prosecutions brought pursuant to those sections, and not to the tribe's civil jurisdiction pursuant to its delegated authority under section 1161.

4. The tribe's jurisdiction to enforce Ordinance 48 as authorized by section 1161 extends to defendants' business establishments, regardless of the title to the property or the racial character of the communities in which they are located.

II. Inherent Authority Under *Montana v. United States*, 450 U.S. 544 (1981) to Enforce Ordinance 48

Notwithstanding the express delegation of authority from Congress under 18 U.S.C. § 1161 as determined in the preceding section of this opinion, the question of the tribe's inherent authority, derived from its sovereign status, to regulate and license liquor establishments operated by non-Indians on the reservation must also be addressed. While liquor regulation is not a traditional attribute of tribal sovereignty (*Rice*, 463 U.S. at 722), there may nevertheless be inherent civil authority in the tribe to regulate such liquor businesses under the standards for tribal civil regulatory authority over non-Indian activities within the reservation as enunciated by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544, 565-66 [8 Indian L. Rep. 1005] (1981). As stated by the Court in *Montana:*

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. *A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealings*, contracts, leases, or other arrangement.

> A tribe may also retain inherent power to exercise civil authority over the *conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe"* (citations omitted; emphasis added).

A. Consensual Relationships Through Commercial Dealings

In the instant case, it is undisputed that defendants operate liquor establishments on fee land within the exterior boundaries of this reservation. These establishments are also located in "Indian country" as defined in 18 U.S.C. § 1151. Under the *Montana* criteria, there are essentially two questions: (1) have the defendants entered into consensual relationships with tribal members through the sale of alcoholic beverages; *and* (2) does their conduct in selling such alcoholic beverages threaten or have some direct effect on the political integrity, economic security, or the health and welfare of the tribe or its members?

Each of the defendants owns and operates for profit a liquor establishment on this reservation. Testimony and evidence presented at the trial was that these defendants advertise their wares on the reservation and encourage tribal members to patronize their establishments, and in fact, tend to choose their liquor inventories with a view toward the drinking patterns and preferences of their tribal member customers. These establishments also cash tribal and government checks for patrons and in at least one case, allow tribal members to have credit at the bar. Clearly, these defendants have availed themselves of the

substantial advantage of doing business with members of the Cheyenne River Sioux Tribe by actively engaging in commerce on the reservation. These activities are unquestionably consensual commercial dealings with tribal members sufficient to satisfy the first standard set forth in *Montana*. Therefore, these defendants are subject to the civil regulatory jurisdiction of the Cheyenne River Sioux Tribe which requires them to abide by the licensing provisions contained in Ordinance 48. Further, were it not for Ordinance 48, the activities engaged in by these defendants with members of the Cheyenne River Sioux Tribe would constitute violations of federal liquor laws and would subject the defendants to federal prosecution.

The court, in addition to and not in lieu of any other findings of fact set forth herein, specifically finds from the testimony and evidence presented that:

1. The liquor establishments owned by defendants make from 15 percent to 85 percent of their sales of alcohol to members of the Cheyenne River Sioux Tribe.

2. These establishments draw customers not only from the immediate area in which they are located, but also from communities throughout the reservation, particularly on Sundays.

3. Most tribal members obtain liquor from the establishment nearest their home, but others travel to other areas of the Reservation to purchase alcohol. This activity increases the danger of accidents and charges of driving under the influence of alcohol.

4. Defendants cash checks for tribal members, including personal checks, tribal payroll checks, general assistance and other government checks.

5. All of the defendants profit from the patronage of members of the Cheyenne River Sioux Tribe in their establishments.

B. Effects on Political Integrity, Economic Security, Health and Welfare of Tribe and Its Members

Defendants admit that alcohol use has devastating effects on individual tribal members and on the tribe itself. The Cheyenne River Sioux Tribe has, by Resolution No. 313-87-CR, declared war on drug and alcohol abuse. This resolution states that the use of alcohol and drugs inflicts upon the people "broken spirits, broken families, pain, grief, suffering and death." Pursuant to this resolution, the tribe has instituted a comprehensive alcohol control policy which includes, among other things, efforts to control the availability of alcohol, education and prevention programs aimed at reducing alcohol abuse, and strict enforcement of laws relating to alcohol use and control. The tribal council has a duty to control and regulate the availability of alcohol on the reservation if it is to ever alieviate the problems caused by alcohol abuse among tribal members.

The Cheyenne River Sioux Tribe Police Department provides law enforcement services and patrols the entire reservation, including the areas occupied by defendants' businesses. Each of the defendants enjoys the protection provided by the tribal police as well as other governmental services of the tribe. The tribal police provide law

enforcement services and assistance to the police departments of Eagle Butte, Timber Lake, Dupree and Isabel, generally involving tribal members who have committed alcohol related offenses or otherwise run afoul of the law due to alcohol use. The tribal police strictly enforce the tribe's alcohol laws on the entire reservation. Arrests for driving while intoxicated increased from 169 in 1986 to 430 in 1987, specifically due to the enhanced tribal law enforcement policy. Arrests made by the tribal police are 90-95 percent alcohol related and 90-95 percent of the police department's budget is spent enforcing alcohol related laws and dealing with alcohol-related problems. The tribal police conduct "bar checks" of all on-sale liquor establishments on the reservation, including those operated by these defendants. The tribal police have been called upon to respond to alcohol related crimes or disturbances at each of the defendants' businesses. The tribal police department had undertaken an extensive training program related to alcohol abuse and enforcement of alcohol related laws, with special emphasis on the youth of the reservations. A Drug Abuse Resistance Education Program (DARE) has been instituted for fifth and sixth graders in schools throughout the reservation. The vast majority of man-hours and financial resources of the tribal police department are devoted to situations wherein alcohol is a major factor.

Another tribal program extensively involved in the problems of alcohol abuse among tribal members is the health department, which is responsible for the health care of residents of the reservation, including non-Indians in emergency situations. The field health office operates four community health clinics in conjunction with the

hospital in Eagle Butte, which is operated by Indian Health Service. Alcohol abuse is the foremost cause of injury and disease among the patients at these clinics, including the attendant problems associated with alcohol abuse, *i.e.*, abuse of elderly, spousal abuse and child abuse and neglect.

The tribal mental health program provides a full range of services to Indians, including counseling and involuntary commitments. This program also serves the entire reservation. The mental health program deals with, among other things, children who are abandoned, neglected, or suffer from fetal alcohol syndrome (FAS) or fetal alcohol effects (FAE). The program is also responsible for responding to suicide threats and attempts. According to testimony and evidence presented at trial, 100 percent of the children referred to the program suffer, directly or indirectly, from the effects of alcohol use/abuse. *All suicide attempts are alcohol related;* 100 percent of elderly abuse is alcohol related; 90-100 percent of spousal abuse is alcohol related. Evidence shows that incidents of FAS and FAE in children are increasing. There is a direct correlation between alcohol abuse and mental illness on the reservation.

The tribal drug and alcohol prevention program provides education, prevention, counseling and treatment services to Indians on the reservation. The goal of this program is to ultimately reduce chemical dependency and its attendant problems through strategies designed to promote positive personal and social growth as well as utilizing off-reservation treatment centers for voluntary and involuntary commitments. The program has both adult and youth clients and deals with problems of

assault, spousal abuse, child abuse and sexual abuse among both adults and children. All of the clients of this program are involved, directly or indirectly, in the use or abuse of alcohol.

The problems of alcohol abuse are so pervasive that they threaten the very existence of the tribe. The defendants activities admittedly contribute to these problems, causing scarce tribal resources to be directed at counteracting the devastation wrought by alcohol abuse instead of directed toward economic development, education, employment, and other areas which would improve the standard of living and quality of life for residents of the reservation. Alcohol abuse burdens the tribal government both as an employer and as a sovereign government because it exacerbates the already tremendous problem of unemployment on the reservation, causes fatalities, physical injuries and property damage, and results in domestic violence and crime among tribal members. The burden placed upon the tribal government is heightened by the defendants' activities. This court finds that defendants' activities not only have a direct effect on but indeed also threaten the political integrity, economic security, health and welfare of the tribe and its members. The tribe can, therefore, regulate their activities under Ordinance 48. In addition to the foregoing, the court finds from the testimony and evidence presented that:

1. Many of the 5,700 tribal members subsist on welfare, commodities or social security.

2. The poverty stricken tribal members face serious economic problems because of alcohol abuse; they spend

their grocery money on alcohol and often sell whatever they have of value in order to purchase alcohol.

3. Adult children of elderly tribal members on fixed incomes often steal or extort from their parents money to buy alcohol, or steal commodities and sell them for alcohol, leaving the aged parent without food or funds with which to purchase food or other necessities.

4. General assistance is the basic financial assistance given by BIA Social Services to tribal members for food, shelter, and clothing if there is no other available source of income.

5. General assistance clients cash checks at defendants' liquor establishments.

6. The unemployment rate on the Cheyenne River Sioux Reservation is 60 percent in the summer and 65 percent in the winter.

7. The tribe is the largest single employer on the reservation, employing approximately 360 persons, most of whom are tribal members.

8. Alcohol-related problems are widespread among tribal employees, resulting in tardiness, absenteeism, and poor work performance.

9. The use of alcohol purchased from defendants contributes to these problems.

10. A large percentage of the tribal budget is devoted either to the treatment and prevention of alcohol problems or is negatively impacted by alcohol abuse among tribal members.

11. The tribe provides health insurance for its employees; the cost of this insurance is increased by the costs of alcohol treatment for employees and their families.

12. Alcohol abuse leads to tremendous early loss of life, dysfunctional families and high morbidity.

13. Use of alcoholic beverages sold by the defendants is a causal factor in alcohol related deaths and injuries among tribal members.

14. Alcohol abuse increases the cost of medical care and causes some elective surgeries and other procedures to be postponed because of the high cost of treating alcohol-related conditions.

15. Each of defendants' liquor establishments is located within one mile of a major highway, and every school, church, day care center and elderly or nursing home in the towns in which establishments are located.

16. Use of alcohol sold by the defendants has been a causal factor in drunk driving incidents on the reservation and alcohol-related property damage.

17. Child abuse and neglect are serious problems on the reservation and the use of alcohol sold by defendants contributes to these problems.

18. Alcohol abuse affects a person's entire lifestyle: the emotional self, the physical self, and the spiritual self; it interferes with parenting skills, affects the whole family negatively, and leaves families unable to care for their basic needs.

19. Alcohol abuse in the family has negative effects on the behavior of children and on their ability to learn and profit from attending school.

20. Incidents of FAS and FAE in children born to tribal members are increasing. These effects are caused by the mother drinking alcohol prior to the birth of the child and are devastating, causing serious mental and social retardation in the child. FAS and FAE are incurable and these children will ultimately have to be cared for by the tribe as they will be unable to function independently in society.

21. Use of alcoholic beverages sold by defendants contributes to FAS and FAE in children of tribal members.

22. Licensing of liquor establishments plays an essential role in any scheme to control the availability of alcohol and regulate its use among tribal members.

III. Authority of Cheyenne River Sioux Tribe to Enforce Ordinance 1

As previously stated, tribal civil regulatory authority over non-Indian activities on fee land must be either expressly delegated to the tribe or inherent in the tribal government by virtue of its sovereign status.

The Cheyenne River Sioux Tribal Council has an affirmative duty to provide for protection of the peace and safety of all reservation residents. The only mechanism by which the council can fulfill this duty is through the enactment and enforcement of ordinances designed to "secure the maximum protection for the Tribe, its members, and other residents of the Reservation." (Law and

Order Code § 1-4-1). Article IV, § 1 of the tribal constitution sets forth the powers of self-government which allow the tribal government to fulfill its duty to all persons on the reservation. Among these powers is the power to "levy taxes and license fees subject to review by the Secretary of the Interior, upon non-members doing business on the reservation." (Article IV, § 1(i), Constitution of the Cheyenne River Sioux Tribe.) Ordinance 1 was originally reviewed by the Secretary of the Interior on August 5, 1937, thus expressly delegating to the tribe the authority to enforce the ordinance according to its own terms against all persons doing business on the reservation. Ordinance 1 is designed to protect all reservation residents from unethical business practices which may be detrimental to the economic welfare of the tribe. (Ordinance 1, section 12.) Clearly, the authority for the promulgation of Ordinance 1 has been delegated to the Cheyenne River Sioux Tribe; it is then the responsibility of the tribal council to ensure that all business operating on the reservation adhere to the terms of the ordinance. The specific purpose of Ordinance 1 is to require each business to purchase a tribal business license, which is subject to revocation should the business engage in practices detrimental to the welfare of the tribe. These defendants, then, are subject to the terms of Ordinance 1, as are other businesses located on the reservation.

However, assuming *arguendo* that the plaintiff does not have the delegated authority to enforce Ordinance 1 against these defendants, a determination must then be made of whether such authority is inherent as part of plaintiff's sovereign status.

Perhaps the most basic premise of all Indian law is that powers vested in an Indian tribe are "inherent powers of a limited sovereign which have never been extinguished." *United States v. Wheeler*, 435 U.S. 313 [5 Indian L. Rep. A-33] (1978). In *Buster v. Wright*, 135 F. 940, 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1905), the Court upheld a tribal business license fee on non-Indians trading on the reservation, even though they owned the lots on which they conducted their business.[13]

Tribal legislative jurisdiction extends to non-Indians when important tribal interests are affected. The regulation must, of course, bear a rational relationship to a legitimate tribal interest. The inquiry is whether and to what extent the tribe has a protectible interest in non-Indian activities on fee land within the reservation. The Court in *Brendale* stated that the tribe is not entitled to "complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and safety of the Tribe." *Brendale*, 492 U.S. at ___ (1989). *See also*

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[13] The authority of the tribe to "prescribe the terms upon which (non-Indians) may transact business within the borders. . . . [is]one of the inherent and essential aspects of its original sovereignty" and the sovereign does not lost its power to govern by a change in "*the ownership or occupancy of land within its territorial jurisdiction by citizens or foreigners.*" Buster, 135 F. at 950 (emphasis in original), cited with approval, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-44 [9 Indian L. Rep. 1001] (1982); *Montana v. U.S.*, 450 U.S. at 566 (1981); *Brendale v. Yakima*, 492 U.S. at ___ (1989).

Montana v. United States, 450 U.S. at 466 (1981). Consensual dealings with tribal members by non-Indian businesses, even if located on fee land, are of the nature envisioned by the *Montana* Court to be regulated by the tribe if they are of a nature as to have a serious and detrimental impact on the tribe or its members.

While both standards of the tribal interest test enunciated in *Montana* do not have to be met, it is clear that in the instant case, all of the defendants not only engage in consensual commercial dealings with tribal members, but those activities also have a direct and detrimental effect on the political integrity, economic security and health and welfare of the tribe and its members for the reasons set forth in preceding sections of this opinion. Defendants sell substantial amounts of alcohol to tribal members and this sale of liquor has a significant negative impact on all facets of life on the reservation. Each defendant has availed itself of the opportunities presented by doing business with tribal members and this business has a significant and adverse effect sufficient for the Cheyenne River Sioux Tribe to invoke its inherent authority to regulate the businesses by licensing them under the provisions of Ordinance 1.

The court specifically finds, in addition to the foregoing, that:

1. The Cheyenne River Sioux Tribe has been expressly delegated the authority under article IV, § 1(1) of its constitution to promulgate Ordinance 1 and enforce it against these defendants.

2. The Cheyenne River Sioux Tribe has the inherent authority to impose its business license laws on each

defendant because each conducts consensual commercial business within the territorial limits of the Cheyenne River Sioux Reservation.

3. The Cheyenne River Sioux Tribe has the power to require each defendant to purchase a tribal business license since each has availed itself of the substantial privilege of entering into commercial dealings with the tribe and its members.

4. The Cheyenne River Sioux Tribe has the inherent authority to exercise civil regulatory jurisdiction over each defendant because the consensual commercial dealings between the defendants and members of the tribe are of a nature such as to have a direct and adverse effect on not only the health, welfare and safety of the individual tribal members, but also upon the political integrity and economic security of the tribe as a whole.

Conclusion

"The purpose of creating reservations as enclaves where tribes retained sovereignty was to assure Indians sufficient control so that they could use their reservations to become economically self-sustaining. Thus, it is consistent with the purpose of the reservation for the tribe to exercise legislative powers over the activities of all persons, Indian and non-Indian alike, when necessary to protect tribal interests in reservation land and other resources. Protection of a tribe's resources is an internal affair over which a tribe's legislative jurisdiction necessarily extends." Cohen, *Federal Indian Law* at 250 (1982 ed.). This court cannot conceive of a resource more valuable to an Indian tribe than its people. The duty of the

tribal government to protect the interests of all tribal members is paramount. This duty, by virtue of the Cheyenne River Sioux Tribe's Constitution and By-Laws and Law and Order Code,[14] extends to all persons on the reservations, Indians and non-Indiana alike. Protection of the welfare of all persons within its jurisdiction is a function of every government which transcends specific internal problems faced by that government. Thus, the responsibility of the plaintiff to all residents of the reservation would exist irrespective of the identified problems with alcohol abuse. Ordinances 1 and 48 have the express purpose and intent of safeguarding the peace and safety of reservation residents against any business practice which is against the *interests* of those residents, whether or not such practices are related to the sale of alcohol.

Further, the Cheyenne River Sioux Tribe has shown by clear and convincing evidence that its interest in protecting itself and its members from the devastating effects of alcohol abuse bears a rational relationship to its regulation of the sale and use of alcoholic beverages through the passage and implementation of Ordinances 1 and 48. Testimony was undisputed that the abuse of alcohol causes numerous serious and difficult problems not only for the individual tribal member who is actively using and abusing alcohol but also for the entire family unit. The social, physical, and economic burdens placed upon the tribal government and its already scarce resources because of the devastation wrought by alcohol abuse

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[14] (Article IV, § 1(i), Article IV, § 1(k) of the constitution; Article V 1(a) of the bylaws and § 1-4-1 of the Law and Order Code.)

demonstrates a serious and detrimental impact on the tribe and its members. The relationship between the tribe's interests and the regulations it seeks to impose is sufficiently close as to warrant enforcement or Ordinances 1 and 48 against these defendants. Both ordinances are essential parts of the tribe's efforts to combat alcoholism, a problem which directly affects the peace and safety of all reservation residents, not just tribal members. To deny the tribe's authority to act pursuant to these ordinances to protect the welfare of reservation residents would deprive the tribe of the means to address a critical problem facing it. The court therefore concludes as a matter of law that:

1. Congress has expressly delegated to the Cheyenne River Sioux Tribe the authority to regulate liquor traffic on all lands within the exterior boundaries of the reservation under 18 U.S.C. § 1161.

2. The Cheyenne River Sioux Tribe has an express delegation of authority by virtue of article IV, § 1(i) of its constitution to levy license fees on all persons doing business upon the reservation.

3. Each defendant has engaged in substantial consensual commercial dealings with the tribe and its members sufficient to subject each of them to the inherent civil authority of the Cheyenne River Sioux Tribe over non-Indian activities on fee lands under the standards set forth in *Montana v. United States*, 450 U.S. at 565-66 (1981), which allow the tribe to regulate and license each of defendants' liquor establishments pursuant to Ordinances 1 and 48.

4. The defendants' commercial distribution of alcohol on the reservation directly and adversely affects the political integrity, economic security, and health and welfare of the tribe and its members to an extent sufficient to allow the tribe to regulate their activities under Ordinances 1 and 48.

Order

Accordingly, the court specifically finds that the Cheyenne River Sioux Tribe has the authority to require all defendants to comply with Tribal Ordinances 1 and 48, which require them to purchase both a tribal business license and a tribal liquor license. The defendants shall be permanently enjoined from operating their business establishments within the exterior boundaries of the Cheyenne River Sioux Reservation unless they, on or before the 8th day of February, 1991, comply with all provisions of Ordinances 1 and 48. Failure to comply with these ordinances will subject the defendants to the closure of their business establishments by the proper officials and to the forfeiture provisions of the tribal law. The moneys currently being held in escrow pending resolution of this dispute are hereby ordered to be released to the Cheyenne River Sioux Tribe, together with all accrued interest thereon. The counterclaims filed by the defendants shall be, and hereby are, denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1148SDRC

City of Timber Lake, et al.,	*	
	*	Order Denying
Appellees,	*	Petition for
	*	Rehearing and
vs.	*	Suggestion for
Cheyenne River Sioux Tribe, et al.,	*	Rehearing En
	*	Banc
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 11, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

§ 1151 Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

§ 1154 Intoxicants dispensed in Indian country

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the

Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 27, 63 Stat. 94.)

§ 1156 Intoxicants possessed unlawfully

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possess intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(June 25, 1948, c. 645, 62 Stat. 759; May 24, 1949, c. 139, § 28, 63 Stat. 94.)

§ 1161 Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

(Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.)

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Cheyenne River Sioux Tribe of
South Dakota's Liquor Ordinance

May 14, 1992.

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice is published in accordance with authority delegated by the Secretary of the Interior to the Assistant Secretary – Indian Affairs by 209 DM 8, and in accordance with the Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161. I certify that the Cheyenne River Sioux Tribe of South Dakota's Liquor Ordinance No. 48 adopted on February 7, 1991, relating to the use and distribution of liquor was duly adopted by the Cheyenne River Sioux Tribe of South Dakota by Ordinance No. 48 (as amended February 7, 1991). The Ordinance provides for the regulation of possession, consumption and importation of alcohol into the area of the Cheyenne River Sioux of South Dakota and the surrounding Indian Country under the jurisdiction of the Cheyenne River Sioux. (See 18 U.S.C. 1151 and 1161).

DATES: This Ordinance is effective as of May 20, 1992.

FOR FURTHER INFORMATION CONTACT:
Branch of Judicial Services, Division of Tribal Government Services, 1849 C Street NW., MS 2612-MIB, Washington, DC 20240-4001: telephone (202) 208-4400. (FTS) 268-4400.

SUPPLEMENTARY INFORMATION:
Ordinance No. 48, as amended February 7, 1991, reads as follows: The Cheyenne River Sioux Tribal Council, acting in accordance with the customary law and practice of the Cheyenne River Sioux Community hereby adopts the following ordinance governing the possession, consumption and importation of alcohol into the Cheyenne River Sioux Reservation.

Section 1. Legislation Findings and Policy

Section 1-1-1. Alcohol Abuse is an Epidemic

The Tribal Council, being vested with the power to protect the public health and to provide for the peace and safety of residents of the Cheyenne River Indian Reservation, hereby finds that alcohol abuse is an epidemic within the territory of the Cheyenne River Sioux Tribe, and further finds that:

(A) Alcohol abuse leads to frequent early loss of life and morbidity among tribal members and other residents of the Reservation. For example, the age adjusted accident death rates due to homicide, suicide, motor vehicle accidents and diseases related to alcohol abuse are several times higher among tribal members than among the general population of the United States, and 90 to 95% of serious trauma cases treated by the Indian Health Service (IHS) on the Reservation are alcohol related.

(B) Alcohol abuse results in dysfunctional families on the Reservation, and the vast majority of child abuse, spousal abuse and elderly abuse that occurs on the Reservation is alcohol related.

(C) Fetal Alcohol Syndrome and Fetal Alcohol Effect occur at alarming rates among children born within the territory of the Tribe and children born with prenatal alcohol damage have difficulty caring for themselves all of their lives. The Tribe has a compelling interest in protecting children from Fetal Alcohol Syndrome and Fetal Alcohol Effect.

(D) Unemployment ranges from 60 to 65% among tribal members on the Reservation and poverty is widespread. Many tribal members suffer serious economic deprivation due to alcohol abuse, ranging from unemployment to starvation.

(E) Alcohol abuse contributes to the vast majority of the crime which takes place within tribal territory and places heavy burdens on the tribal criminal justice system and the tribal courts.

(F) Alcohol abuse has a devastating impact on our families and the Reservation Community, and the Tribal Council has a duty to combat alcohol abuse.

(G) Both the Tribe and the Federal Government devote tremendous resources to prevent and treat problems of a [sic] alcohol abuse on the Reservation, yet even the combined prevention and treatment programs sponsored by the Tribe and the Federal Government are not sufficient to address the problems of alcohol abuse. Far more must be done.

(H) The Tribe must exercise its regulatory authority to combat the problems of alcohol abuse on the Reservation through a comprehensive, consistent and clearly defined plan to minimize alcohol consumption on the

Reservation and to discourage unsafe drinking practices. In addition, the Tribe must raise additional revenue to combat the problems of alcohol abuse.

Section 1-1-2. Declaration of War on Alcohol Abuse

For the spiritual well-being of our children and families and for the survival and strengthening of our people, the Cheyenne River Sioux Tribe declares War on Alcohol Abuse and strives for the elimination of alcohol abuse and its associated problems from the Cheyenne River Indian Reservation by the year 2000. In furtherance of the Tribe's War on Alcohol Abuse, the Tribal Council hereby declares that it is the policy of the Cheyenne River Sioux Tribe:

(A) To minimize alcohol consumption among residents of the Reservation:

(B) To discourage unsafe drinking practices, including, but not limited to, driving while intoxicated, alcoholism or chronic intoxication, violence related to alcohol abuse, public intoxication and drinking during pregnancy:

(C) To minimize the adverse health effects of drinking alcohol through prevention, regulation and treatment:

(D) To protect unborn children, who are people in their own right, from prenatal alcohol damage:

(E) To control the supply of alcoholic beverages through taxation and regulation, and to control conditions of availability of alcoholic beverages through education and regulation:

(F) To maximize education, prevention and treatment programs to fight alcohol abuse: and

(G) To cause those who sell or consume alcoholic beverages to bear a greater proportion of the costs associated with alcohol abuse through taxation of alcoholic beverages and alcoholic beverage dealers and dedicating revenue derived therefrom for alcohol abuse education, enforcement, prevention, regulation and treatment.

Section 2. General Provisions and Definitions

Section 2-1-1. Delegated Authority

In accordance with Article IV, section 3 of the Constitution (*Future powers*), the Tribal Council of the Cheyenne River Sioux Tribe hereby exercises the authority delegated to the Tribe by the Congress of the United States of America to regulate the manufacture, distribution, sale, possession and consumption of alcoholic beverages within the territory of the Tribe.

Section 2-1-2. Statement of Purpose

The purpose of this Alcoholic Beverages Control Law is to regulate the manufacture, distribution, sale, possession and consumption of liquor on the Cheyenne River Indian Reservation. It is the Cheyenne River Sioux Tribe's intent in enacting this Ordinance to prohibit all traffic in liquor on the Cheyenne River Indian Reservation except to the extent allowed and permitted under the express terms of this Ordinance. Any person desiring to engage in the possession, sale, trade, transport or manufacture of alcoholic beverages on the Cheyenne River Sioux Indian

Reservation shall comply with the rules and regulations set forth in this Alcoholic Beverages Control Law. This Ordinance shall be cited as the "Cheyenne River Sioux Alcoholic Beverages Control Law" and is promulgated pursuant to the constitutional, delegated and inherent authority of the Tribe for the purpose of protecting the welfare, health, peace, morals and safety of all people residing on the Cheyenne River Indian Reservation. All the provisions of this Ordinance shall be liberally construed to accomplish the above-declared purpose.

Section 2-1-3. Applicability

This Ordinance shall apply to all persons engaged in the activities described herein on any and all lands and areas within the exterior boundaries of the Cheyenne River Indian Reservation, including lands here [sic] in fee and all other lands subject to the jurisdiction of the Cheyenne River Sioux Tribe.

Section 2-1-4. Definitions

The terms used in this Alcoholic Beverages Control Law, unless the context plainly otherwise requires, shall mean:

(A) "Alcoholic beverage," any distilled spirits, wine and malt beverages as defined in this Ordinance.

(B) "Alcoholic Beverage Dealer," any person who sells or engages in commercial traffic in alcoholic beverages, including manufacturers, retailers, solicitors, transporters and wholesalers.

(C) "Cheyenne River Indian Reservation" shall include any and all lands within the territory of the Cheyenne River Indian Reservation as set forth in Article I of the Constitution of the Cheyenne River Sioux Tribe, whether said lands are trust, allotted or lands held in fee patent status.

(D) "Commission," the Alcoholic Beverage Control Commission.

(E) "Contraband," any alcoholic beverage introduced into, or possessed, offered for sale or used within, the territory of the Tribe contrary to tribal law and any receptacle or container in which such alcoholic beverages are found.

(F) "Director," the Director of the Revenue Department.

(G) "Distilled spirits," ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use containing not less than one-half of one percent of alcohol by volume.

(H) "Distiller" means any person who owns, or who himself or through others, directly or indirectly, operates or aids in operating any distillery or other establishment for the production, rectifying, blending, or bottling of intoxicating liquor other than beer.

(I) "Liquor," any alcoholic beverage.

(J) "Malt beverage," a beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both. In potable brewing water of malted barley with hops, or their parts, or their products, and with or

without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human consumption containing not less than one-half of one percent of alcohol by volume, and commonly referred to as beer or ale.

(K) "Manufacturer," any person who owns, or who himself or through others, directly or indirectly, operates or aids in operating any facility which produces alcoholic beverages.

(L) "Off Sale," the sale of any alcoholic beverage for consumption off the premises where sold.

(M) "On Sale," the sale of any alcoholic beverage for consumption only upon the premises where sold.

(N) "On-Sale dealer," any person who sells, or keeps for sale, any alcoholic beverage for consumption on the premises where sold.

(O) "Package" means the bottle or immediate container of any alcoholic beverage.

(P) "Package dealer," any person other than a distiller, manufacturer, or wholesale [sic], who sells, or keeps for sale, any alcoholic beverage for consumption off the premises where sold.

(Q) "Person," any individual, firm, partnership, joint venture, association, corporation, municipal corporation, estate, trust, business receiver, or any group or combination acting as a unit and the plural as well as the singular in number.

(R) "Retailer," or "retailer dealer" any person who sells alcoholic beverages for other than resale.

(S) "Retailer license," an on-or off license issued under the provisions of this Ordinance.

(T) "Revenue Department," the Cheyenne River Sioux Tribal Revenue Department.

(U) "Sale," the transfer, for a consideration, of title to any alcoholic beverage.

(V) "Solicitor," any person employed by a licensed wholesaler within or without the territorial limits of the Cheyenne River Indian Reservation, or by any distiller or manufacturer within or without the Reservation, who solicits orders of intoxicating liquor from wholesale or retail dealers within the Reservation.

(W) "Transportation company," or "transporter," any common carrier or operator of a private vehicle transporting or accepting for transportation any alcoholic beverage destined to be delivered to the Cheyenne River Indian Reservation, but not including transportation by carriers in interstate commerce where the shipment originates outside of the state and is destined to a point outside of the state.

(X) "Treasurer," the duly elected and acting Treasurer of the Cheyenne River Sioux Tribe.

(Y) "Tribal Council," the governing body of the Cheyenne River Sioux Tribe.

(Z) "Wholesaler," any person who sells alcoholic beverages to retailers for resale.

(AA) "Wine," any liquid either commonly used, or reasonably adapted to use, for beverage purposes, and obtained by the fermentation of the natural sugar content of fruits or other agricultural products containing sugar and containing not less than one-half of one percent of alcohol by volume but not more than twenty-four percent of alcohol by volume.

Section 3. Licensing Policies and Procedures

Section 3-1-1. Granting of License

Any person intending to introduce, sell, trade, transport or manufacture alcoholic beverages on the Cheyenne River Indian Reservation shall make application for a license and present the completed application to the Cheyenne River Sioux Revenue Department. The liquor license fees shall be in annual payments, due prior to the 1st day of January of each calendar year, for the following prescribed fees:

Section 3-1-2. Wholesale Licensing

The fee for an annual wholesale license shall be set by Tribal Council resolution at not less than Two Hundred Dollars ($200.00) and no more than Three Thousand Dollars ($3,000.00).

Section 3-1-3. Retail Licensing

The fee for an annual retail license shall be set by Tribal Council resolution at not less than One Hundred Dollars ($100.00) and no more than Twenty-Five Hundred Dollars ($2,500.00).

Section 3-1-4. Transport Licensing

The fee for an annual transport license shall be set by Tribal Council resolution at not less than Two Hundred Dollars ($200.00) and no more than One Thousand, Five Hundred Dollars ($1,500.00).

Section 3-1-5. Operating of a Plant Distilling Intoxicating Liquor

The fee for an annual distilling plant shall be set by Tribal Council resolution at not less than One Thousand Dollars ($1,000.00) and no more than Five Thousand Dollars ($5,000.00).

Section 3-1-6. Solicitors

The fee for an annual solicitors license shall be set by Tribal Council resolution at not less than Two Hundred Dollars ($200.00) and no more than Seven Hundred Fifty Dollars ($750.00).

Section 3-1-7. Alcoholic Beverage Control Commission

There is hereby created a Cheyenne River Sioux Tribal Alcoholic Beverage Control Commission.

(A) The Alcoholic Beverage Control Commission shall consist of:

(1) A member of the Tribal Council Health Committee:

(2) A member of the Tribal Council Revenue Committee:

(3) A member of the Tribal Council Education Committee:

(4) A member of the Cheyenne River Sioux Tribal Police Commission: and

(5) A physician or other expert professionally trained in the area of alcohol abuse prevention and treatment.

(B) The Commissioner from the Tribal Council Health Committee shall chair the Alcoholic Beverage Control Commission. The Chairman shall preside at Commission hearings but shall not exercise his power to vote, except in the case of a tie.

(C) A quorum of the Commission shall consist of three members, and a quorum is required to exercise Commission authority.

(D) No Commission member shall participate in any Commission decision in which he has direct interest or in which any member of his immediate family has a direct interest.

Section 3-1-8. Powers of the Alcoholic Beverage Control Commission

Commissioners shall be appointed by the Tribal Council for terms of two years, and shall be removed only for cause, after notice and an opportunity for a hearing before the Tribal Council. When a vacancy occurs on the Commission, the Tribal Council shall appoint a new Commissioner for the balance of the term.

(A) The Alcoholic Beverage Control Commission shall have the power to:

(1) Review license applications and grant licenses:

(2) Conduct hearings on alleged violations of this Ordinance:

(3) Establish rules and regulations governing the conduct of the Commission and the exercise of Commission authority:

(4) Collect taxes, impose penalties, suspend and/or revoke licenses when violations of this Ordinance are proved by a preponderance of the evidence: and

(5) Enjoin violations of this Ordinance and enforce the orders of the Commission.

(B)(1) Taxes may be collected by the Commission through assessment and distraint or other necessary means:

(2) Penalties may be collected through the attachment, levy and sale of property or other necessary means:

(3) Orders suspending or revoking licenses or enjoining the operations of liquor dealers may be enforced by the Tribal Police acting at the direction of the Commission.

Section 3-1-9. Qualifications for License

No license shall be issued unless the applicant shall be twenty-one years of age, has filed a sworn application, accompanied by the required fee, showing the following qualifications and subject to the following standard:

(A) An applicant, other than a corporation, must be a legal resident of the United States and a person of good moral character. If the applicant is a corporation, partnership, joint venture, association, municipal corporation, estate, trust, business receiver or firm, the manager of the licensed premises must be a resident of the United States and a person of good moral character. Officers and directors of corporations, partners, and directors of corporations, and partners, joint venturers, principals of associations and municipal corporations, trustees, business receivers and members of firms must be legal residents of the United States and persons of good moral character. Applicants must also be licensed with the Cheyenne River Indian Reservation.

(B) The Alcoholic Beverage Control Commission may require the applicant to set forth such other information as is necessary to enable it to determine if a license should be granted.

(C) The Alcoholic Beverage Control Commission shall issue a license only if the qualifications set forth herein are satisfied and if it concludes, within its discretion, that the best interests of the Reservation community shall be served. In considering applications by retail dealers, the Alcoholic Beverage Control Commission may take into account the following factors, among others, in determining whether the issuance of a license will serve the best interests of the Reservation community:

(1) Whether the license applied for is for the operation of a new or an existing retail liquor establishment:

(2) Whether the applicant is in compliance with applicable tribal, state and federal law:

(3) Whether the applicant has violated any provision of this Ordinance, and if so, whether the violation has been remedied:

(4) The location, number and density of retail liquor establishments in the community:

(5) Whether food is sold at the establishment: and

(6) The health and welfare of the public.

Section 3-1-10. Public Comments

Before the issuance of any tribal liquor license, the Cheyenne River Sioux Tribe shall allow comments from the public. The Alcoholic Beverage Control Commission shall be the determining authority for the granting of any tribal liquor license.

Section 3-1-11. Appeal

Any applicant who is denied a license by the Alcoholic Beverage Control Commission may appeal the Commission's decision to deny the license to the Superior Court by filing a notice of appeal with the Court, clearly stating the grounds therefore [sic], and serving a copy of the notice of appeal by hand on the Director of the Revenue Department within thirty (30) days from the date of the decision. The Superior Court shall uphold the decision of the Alcoholic Beverage Control Commission unless it finds that the Commission's decision was arbitrary and capricious, an abuse of discretion, or not in accordance with this Ordinance or other applicable tribal or federal law.

Section 4. Prohibitions

Section 4-1-1. General Prohibition

It shall be unlawful to introduce, manufacture for sale, sell, or offer or keep for sale or transport alcoholic beverages on the Cheyenne River Indian Reservation except upon the terms, conditions, limitations, and restrictions specified in this Ordinance. In addition to any other civil penalty provided for this Ordinance, each violation of this section may subject the violator to a civil fine not to exceed $5,000.

Section 4-1-2. Disposal Prohibited on Certain Days

No licensee of any class shall sell intoxicating liquor on Sunday, Memorial Day and Christmas Day. No licensee of any class shall sell intoxicating liquor on Tribal election day while the polls are open. In addition to any other civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation. The Alcoholic Beverage Control Commission may, in its discretion, waive this prohibition for a specified day.

Section 4-1-3. Disposal Prohibited During Certain Hours

No licensee shall sell or provide alcoholic beverages to any person on the licensed premises before eleven o'clock a.m. or after one o'clock a.m. Mondays through Thursdays; and no licensee shall sell or provide alcoholic beverages to any person on the licensed premises before eleven o'clock a.m. or after two o'clock a.m., Fridays

through Saturdays. No off-sale dealer shall sell or provide alcoholic beverages to any person before eleven o'clock a.m. or after eleven o'clock p.m. Mondays through Thursdays, and no off-sale dealers shall sell or provide alcoholic beverages to any person before eleven o'clock a.m. or after twelve o'clock a.m. (midnight), Fridays through Saturdays. In addition to any other civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation.

Section 4-1-4. Prohibition as to Persons Under Twenty-One Years of Age

No license of any class shall provide directly or by a clerk, agent or servant, intoxicating beverages to any person under the age of twenty-one years. In addition to any civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $100 for each violation.

(A) In addition, any person who is injured as a result of a violation of this section shall have a right of action against the person who contributed to his injury by providing alcoholic beverages to a minor person. The Superior Court shall have jurisdiction to hear such actions.

(B) An action under subsection (A) of this section shall be commenced within 2 years after the damage, injury or death.

Section 4-1-5. Prohibition as to Provision to Intoxicated Persons

(A) No licensee of any class shall provide directly or by a clerk, agent or servant, alcoholic beverages to a visibly intoxicated person. In addition to any other civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation.

(B) In addition, any person who is injured as a result of a violation of this section shall have a right of action against the person who contributed to his injury by providing alcoholic beverages to a visibly intoxicated person. The Superior Court shall have jurisdiction to hear such actions.

(C) An action under Subsection (B) of this section shall be commenced within 2 years after the damage, injury or death.

Section 4-1-6. Prohibition as to Provision to Pregnant Persons

No licensee of any class shall knowingly provide directly or by a clerk, agent or servant alcoholic beverages to any person who is pregnant. In addition to any other civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation.

Section 4-1-7. Prohibition as to Purchase or Use by Pregnant Persons

No person shall purchase, obtain or use alcoholic beverages while pregnant. Any person who violates this

section may be subject to a civil fine not to exceed $500. When there is serious danger of prenatal alcohol damage to the unborn child, the violator may be civilly committed to an alcohol abuse treatment facility for a period of time not to exceed the duration of the pregnancy by order of the Superior Court. The Superior Court shall, in determining such cases, follow the procedural rules provided by tribal law for involuntary civil commitments.

Section 4-1-8. Prohibition Against Cashing Subsistence Checks

No licensee of any class shall, directly or by clerk, agent or servant, knowingly cash or accept any General Assistance check issued by the Federal Government any Aid to Families with Dependent Children check issued by the state government or any other government subsistence check. In addition to any other civil penalty provided for in this Ordinance, any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation.

Section 4-1-9. Prohibition Against Drive-up Windows

No licensee shall sell or provide alcoholic beverages from a drive through window or entrance. In addition to any other civil penalty provided for in this Ordinance. any licensee who violates this section may be subject to a civil fine not to exceed $500 for each violation.

Section 5. Taxation

Section 5-1-1. Wholesale Alcoholic Beverage Excise Tax

There is hereby imposed a wholesale alcoholic beverage tax excise tax of 7.5% on the wholesale price of all alcoholic beverages introduced into the Cheyenne River Indian Reservation for sale or provision to a retail alcoholic beverage dealer.

Section 5-1-2. Delivery of Beverages for Resale Prohibited Except to Licensees

No manufacturer, wholesaler, or transporter shall sell or deliver any package containing alcoholic beverages manufactured or distributed by him for resale, unless the person to whom such package is sold or delivered is a licensed alcoholic beverage dealer. In addition to any other civil penalty provided for in this Ordinance, any person who violates this section may be subject to a civil fine not to exceed $250 for each violation.

Section 5-1-3. Retail Alcoholic Beverages Dealers to Purchase only from Licensed Wholesalers, Etc.

Retail alcoholic beverages dealers shall buy or receive alcoholic beverages *only* from wholesalers, solicitors or transporters licensed under this Ordinance. In addition to any other civil penalty provided for in this Ordinance, any person who violates this section may be subject to a civil fine not to exceed $250 for each violation.

Section 5-1-4. Monthly Return and Payment of Wholesale Alcoholic Beverage Excise Tax

Wholesalers and other alcoholic beverage dealers who introduce, or otherwise cause to be introduced, alcoholic beverages into the Cheyenne River Indian Reservation for provision to retail alcoholic beverages dealers shall be liable for payment of the wholesale alcoholic beverage excise tax and shall file monthly returns with the Revenue Department, on such forms as the department may require, showing the kind, quantity and price of the alcoholic beverages introduced, or otherwise caused to be introduced, into the Cheyenne River Indian Reservation, along with the names of the person to whom the alcoholic beverages were provided, the amount of the tax due and other information which the Revenue Department may reasonably require. Said return, covering the period of one calendar month, shall be transmitted to the department on or before the twenty-fifth day of the month following the close of the reporting period. The tax due for that period shall be remitted together with the monthly return.

Section 5-1-5. Records and Reports Required of Licensees – Entry and Examination on Default

Any person liable for the payment of the wholesale alcoholic beverage excise tax shall keep, in current and available form on the licensed premises, records of all purchases, sales, quantities on hand and such other information as the Director of the Revenue Department may reasonably require. the Director may require from any licensee any reports he or she shall prescribe, and he or she may require the production of any book, record,

document, invoice, and voucher kept, maintained, received, or issued by any such licensee in connection with his business, which in the judgment of the Director may be necessary to administer and discharge his duties, to secure the maximum of revenue to be paid, and to carry out the provisions of law. If default is made, or if any such licensee fails or refuses to furnish any other reports or information referred to upon request therefor, the Director may enter the premises of such licensee where the records are kept and make such examination as is necessary to compile the required report. The cost of such examination shall be paid by the licensee whose reports are in default.

Section 5-1-6. Reports Required on Shipments of Beverages into Reservation

Any person outside the Reservation who sells or ships alcoholic beverages to a manufacturer, wholesaler, solicitor, transporter or retailer within this Reservation shall forthwith forward to the Director such a report as the Director shall require, giving the name and address of the licensee or person making the purchase, the quantity and kind of alcoholic beverages sold, the manner of delivery and such other information as the Director requires.

Section 5-1-7. Tax Stamps

The wholesaler alcoholic beverage excise tax shall be required to be evidenced by an identification stamp to be affixed to original packages of alcoholic beverages introduced into the Cheyenne River Indian Reservation. The

Revenue Department shall adopt the design of the identification stamp, procure manufacture of the stamp, and shall issue rules regarding the issuance and use of the stamp.

Section 5-1-8. Counterfeiting of Stamps

Every person who shall make, manufacture, counterfeit, duplicate or in any other way imitate any identification stamp, provided for in section 5-1-4 above, or who shall possess or in any way use such counterfeit or imitated stamp, may be assessed a civil fine not to exceed $5,000 for each violation.

Section 5-1-9. Penalty and Interest on Delinquency in Payment of Tax – False Return – Collection of Tax and Penalties

If any person liable for the wholesale alcoholic beverage excise tax fails to pay the tax on the date payment is due, there shall be added to the tax ten percent of the amount of the tax unpaid. The amount of the tax and penalty shall bear interest at 1.5% per month from the date of delinquency until paid.

If any licensee files a false or fraudulent return, there shall be added to the tax an amount equal to the tax evaded, or attempted to be evaded. All such taxes and civil penalties may be collected by assessment and distraint.

Section 5-1-10. Possession of Unstamped Beverages Prohibited

No person may possess any alcoholic beverage other than in a package upon which the required tax stamps are

affixed. In addition to forfeiture and any civil penalty provided for elsewhere in this Ordinance, each violation of this section shall subject the violator to a civil fine not to exceed $250.

Section 5-1-11. Luxury Tax on Retail Purchase of Alcoholic Beverages

There is hereby imposed a luxury tax of 10% on the retail sale price of alcoholic beverages purchased within the Cheyenne River Indian Reservation. This tax shall be levied and collected in addition to any tribal sales tax.

Section 5-1-12. Monthly Return, Collection and Remittance of Luxury Tax on Retail Purchase of Alcoholic Beverages

Retail alcoholic beverage dealers shall be liable for the collection and remittance of the luxury tax on the retail sale price of alcoholic beverages. Retail alcoholic beverage dealers shall keep accurate records of all sales of alcoholic beverages and shall file monthly returns with the Revenue Department, on such forms as the department may require, showing the quantity and the price of alcoholic beverages sold at retail, along with the amount of the tax due and other information which the department may reasonably require. Said return, covering the period of one calendar month, shall be transmitted to the department on or before the twenty-fifth day of the month following the close of the reporting period. The tax due for that period shall be remitted together with the monthly return.

Section 5-1-13. Reports Required of Retail Alcoholic Beverage Dealers

Retail Alcoholic Beverages Dealers shall keep, in current and available form on the licensed premises, records of all purchases, sales, quantities on hand and such other information as the Director of the Revenue Department may reasonably require. The Director may require from any licensee any reports he shall prescribe, and he may require the production of any book, record, document, invoice, and voucher kept, maintained, received, or issued by any such licensee in connection with his business, which in the judgment of the Director may be necessary to administer and discharge his duties, to secure the maximum of revenue to be paid, and to carry out the provisions of law. If default is made, or if any such licensee fails or refuses to furnish any other reports or information referred to upon request therefore [sic], the Director may enter the premises of such licensee where the records are kept and make such examination as is necessary to compile the required report. The cost of such examination shall be paid by the licensee whose reports are in default.

Section 5-1-14. Penalty and Interest on Delinquency in Collection and Remittance of Tax – False Return – Collection of Tax and Penalties

If any person responsible for the collection and remittance of the luxury tax on retail alcoholic beverage sales fails to remit the tax on the date that payment is due, there shall be added to the amount of the tax due ten percent of the amount of the tax unpaid. The amount of the tax and penalty shall bear interest at the rate of 1.5%

per month from the date of delinquency until paid. If any licensee files a false or fraudulent return, there shall be added to the tax an amount equal to the tax evaded, or attempted to be evaded. All such taxes and civil penalties may be collected by assessment and distraint.

Section 5-1-15. Tax Agreements Authorized

The Tribal Council finds that the public interest of residents of the Reservation is best served by cooperation between the Tribe, the State of South Dakota and/or its subdivisions in the area of taxation of alcoholic beverages. Accordingly, the Tribal Council hereby authorizes the Revenue Department to negotiate tax collection agreements with the State and/or state subdivisions. Such agreements shall be submitted by the Revenue Department to the Tribal Council for approval before they are final.

Section 5-1-16. Dedication of Tax Revenue

All tax revenues collected pursuant to this Ordinance shall be dedicated to alcohol abuse education, enforcement, prevention, regulation and treatment.

Section 6. Penalties Imposed for Violations of Ordinance

Section 6-1-1. General Penalties

Anyone violating this Ordinance shall be subject to suspension or revocation of their tribal license.

Section 6-1-2. Hearing on Alleged Violations

Anyone having information that a person has violated any provisions of this Ordinance may file with the Revenue Department an affidavit specifically setting forth such violation. Upon receipt of such affidavit, the Revenue Department may set the matter for a hearing before the Alcoholic Beverage Control Commission within 60 days. A copy of the affidavit and notice of hearing shall be mailed to the affected person by registered mail not less than five days before the hearing. A record of such hearings will be made by stenographic notes or by the use of an electronic recording device. The person shall have the right to be represented by counsel, question witnesses and examine the evidence against him or her as well as to present evidence and witnesses in his or her own defense.

Section 6-1-3. Suspension or Revocation of License

If after such hearing the Alcoholic Beverage Control Commission finds the violation set forth in the affidavit has been proved by preponderance of the evidence, an order shall be served on the licensee revoking or suspending the license for a period of time or imposing such other civil penalties as are provided for in this Ordinance. A decision of the Commission imposing civil fines or directing the payment of taxes may be automatically stayed by posting an appeal bond with the Superior Court in the amount of the fine imposed or taxes to be collected. A decision of the Commission revoking or suspending a license may be automatically stayed by posting a $10,000 appeal bond with the Superior Court.

Section 6-1-4. Powers of the Alcoholic Beverage Control Commission Chairman

The Chairman of the Alcoholic Beverage Control Commission, or his designee, at a hearing under this Ordinance shall have the power to administer oaths and to subpoena and examine witnesses.

Section 6-1-5. Appeal

Any person who is aggrieved by decision of the Alcoholic Beverage Control Commission suspending or revoking a license, imposing a civil penalty or collecting taxes imposed by this Ordinance may appeal the Commission's decision to the Superior Court by filing a notice of appeal, clearly stating the grounds therefor, and serving a copy of the notice of appeal by hand on the Director of the Revenue Department within thirty days from the date of the decision. The Superior Court shall uphold the decision of the Alcoholic Beverage Control Commission unless it finds that the Commission's decision was arbitrary and capricious or other applicable tribal or federal law. In the event that a decision imposing a civil penalty or ordering the collection of taxes is overturned on appeal, the Court may order the Commission to refund such penalty or taxes.

Section 7. Contraband

Section 7-1-1. Contraband Alcoholic Beverages – Containers – Forfeiture

The introduction of alcoholic beverages into, and possession, sale or use of alcoholic beverages within, the territory of the Cheyenne River Sioux Tribe contrary to

trial law is inimical to the public interest. All alcoholic beverages introduced into, or possessed, offered for sale or used within, the territory of the Cheyenne River Sioux Tribe contrary to tribal law, and any receptacle or container of any kind in which said alcoholic beverages are found, are hereby declared to be contraband. No property right shall exist in contraband alcoholic beverages or any receptacle or container wherein such alcoholic beverages are found. Contraband alcoholic beverages and any receptacle or container in which such alcoholic beverages are found are hereby declared forfeit and shall be seized forthwith.

Section 7-1-2. Seizure of Contraband Alcoholic Beverages – Containers – Search Warrant

When an officer of the Tribe has probable cause to believe that a person has contraband alcoholic beverages within the territory of the Tribe and a search warrant is required under tribal law or under the Federal Indian Civil Rights Act, 25 U.S.C. sec. 1301 *et. seq.*, he may apply to the Superior Court of the Tribe for a warrant to authorize the search of said person and any places, containers, conveyances, and receptacles, etc., which the officer has probable cause to believe contain said contraband alcoholic beverages. If the Superior Court determines that probable cause exists that a person has contraband alcoholic beverages within the territory of the Tribe, then the Court shall issue a search warrant describing the person, places and things to be searched and the things to be seized. The officer shall execute the search warrant and seize any and all contraband alcoholic beverages found and any receptacles and any containers in which said

contraband alcoholic beverages are found. The officer shall turn the contraband over to the Revenue Department, which shall store the contraband for at least thirty days prior to disposition.

Section 7-1-3. Judicial Determination as to Nature of Alcoholic Beverages Seized

(A) Within ten calendar days after the seizure of any alcoholic beverages, or any receptacle or container in which said alcoholic beverages are found, on the grounds that they are contraband, any person claiming an interest therein may initiate an action for a determination as to whether the items seized are contraband by filing a claim with the Superior Court and serving notice of the claim on the Director of the Revenue Department. The Superior Court shall then schedule a hearing on the matter within fifteen calendar days after the filing of the claim.

(B) The Superior Court shall, upon good cause shown, permit discovery to be taken on an expedited basis. The Superior Court shall regulate the manner and timing of such discovery; provided that when the Superior Court orders expedited discovery, the time for a hearing may be postponed for a period of sixty (60) days. All discovery shall be completed prior to the hearing date.

(C) The Tribe shall have the burden to establish a prima facie case that items seized are contraband, and after such proof is made, the burden shall shift to the claimant to prove by a preponderance of the evidence that the items seized are not contraband.

(D) If the Superior Court determines that the items seized by the Tribe are not contraband, the Court shall order the return of the items to the claimant after the time for filing an appeal has elapsed. If the Superior Court determines that the items seized are contraband, the Court shall declare the items to be contraband and the Tribe may dispose of the contraband as it deems fit after the time for filing an appeal has elapsed.

(E) The Tribe may appeal an adverse decision of the Superior Court under this section to the Appellate Court by filing a notice of appeal within ten calendar days of the date of the decision of the Superior Court. Filing of the notice of appeal by the Tribe shall automatically stay the decision of the Superior Court. The Appellate Court shall uphold the decision of the Superior Court unless it is clearly erroneous.

(F) The claimant may appeal an adverse decision of the Superior Court under this section to the Appellate Court by filing a notice of appeal within ten calendar days of the date of the decision of the Superior Court and posting an appeal bond in an amount set by the Superior Court. The Superior Court shall set the appeal bond in an amount sufficient to pay for the storage of the items in dispute during the pendency of the appeal and any court costs which may be incurred by the Tribe on the appeal. Filing of the notice of appeal by the claimant and payment of the appeal bond shall automatically stay the decision of the Superior Court. The Appellate Court shall uphold the decision of the Superior Court unless it is clearly erroneous.

Section 8. Exceptions

Section 8-1-1. Exceptions to this Ordinance

The provision of this Ordinance shall not apply to the sale of alcoholic beverages, or to ethanol, used or intended for use, for the following purposes:

(A) For scientific research or manufacturing products other than liquor:

(B) Medical use under the direction of a physician, medical or dental clinic, or hospital:

(C) In preparations not fit for human consumption such as cleaning compounds and toilet products, or flavoring extracts:

(D) By persons exempt from regulation in accordance with the laws of the United States: or

(E) For sacramental use such as wines delivered to priests, rabbis, and ministers.

Section 9. Miscellaneous Provisions

Section 9-1-1. Agreement by Licensee to Grant Access for Inspection Purposes

Every licensee under this Ordinance, as a condition of the grant of a tribal license, consents to the inspection of his premises, including all buildings, safes, cabinets, lockers and storerooms thereon. Such inspection shall be available upon the demand of the Commission. These inspections shall be conducted by a duly appointed designee of the Commission, or tribal or federal police.

All books and records dealing with the sale and ownership of alcoholic beverages shall be open for inspection purposes by the Commission.

Section 9-1-2. Transferability

No license issued pursuant to this Ordinance shall be transferable; provided, however, upon death of an individual licensee, the personal representative of the estate may operate under a valid license for sixty (60) days after the licensee's death, so long as said personal representatives shall apply to the Tribe for a new license within said sixty (60) day period.

Section 9-1-3. Health Warnings

(A) The Health Department of the Cheyenne River Sioux Tribe shall create signs warning of the dangers faced by those who consume alcohol, including warning of the dangers to pregnant women, the dangers of drunk driving and such other warnings as the department shall deem necessary. The language in such signs shall be referred to the Indian Health Service for comments and shall be approved by a licensed physician prior to assurance [sic]. The Revenue Department shall issue copies of such signs in a conspicuous manner in close proximity to the area where alcohol is dispensed or sold.

(B) The Health Department of the Cheyenne River Sioux Tribe shall create pamphlets warning pregnant persons of the dangers of alcohol use during pregnancy. The language in such pamphlets shall be referred to the Indian Health Service for comments and shall be approved by a licensed physician prior to issuance. The

Revenue Department shall issue copies of such pamphlets to all retail dealers. Each retail dealer shall offer one of these pamphlets to each pregnant person who is refused service pursuant to Sec. 4-1-5.

Section. 9-1-4. Server Training

Every person who serves alcoholic beverages on the premises of an on-sale license shall attend 8 hours of training in a server training program approved by the Alcoholic Beverage Control Commission on the latter of his or her 60th day of employment or within 60 days after the effective date of this Ordinance.

Section. 9-1-5. Tribal Sovereign Immunity

No provision of this Ordinance shall be construed to permit the recovery of money damages against the Tribe. No provision of this Ordinance shall be construed to waive the sovereign immunity of the Tribe, except as expressly provided in Sections 3-1-11, 6-1-5, and 7-1-3.

Section 10. Severability

Section. 10-1-1. Severability

If for any person, or circumstances, and [sic] provision(s) or section(s) of this Ordinance are held invalid by the appropriate court of jurisdiction, the remainder of this Ordinance and other provisions or sections shall not be affected in the application of the application of this Ordinance or to any person covered by this Ordinance.

Section 11. Effective Date of Ordinance No. 48 as Amended February 7, 1991

Section 11-1-1. Continued Operation Under Existing License

Ordinance No. 48 is hereby amended and said Ordinance is effective as amended sixty (60) days after its publication in the Federal Register. Any licensee operating under an existing tribal license may continue to operate thereunder until December 31, 1991, provided that the license complies with all of the provisions contained here, including the provisions relating to hours of operation, prohibited acts and taxation.

Eddie F. Brown,

Assistant Secretary, Indian Affairs.

[FR Doc. 92-11717 Filed 5-19-92; 8:45 am]

BILLING CODE 4370-02-M#

RAPID CITY JOURNAL
SUN NOV 17 1987

Reservation resolves beer-truck brouhaha

WANBLEE – State, federal and tribal justice system officials got involved, but it turned out to be a tempest in a teapot. Or maybe a beer keg.

Early Thursday, an Oglala Sioux Public Safety officer impounded a Chamberlain Wholesale Grocery Co. truck for bringing beer onto Pine Ridge Indian Reservation.

Federal law prohibits the possession or sale of beer on the reservation.

The 360 cases of beer and one keg were unloaded and held in the Kyle Jail. However, the driver was allowed to deliver the rest of his groceries.

U.S. Attorney Phil Hogen won the the [sic] truck and beer's release Friday. He told the Oglala Sioux Tribal Court the truck was involved in interstate commerce and was not violating reservation alcohol laws.

The court agreed that the beer was destined for off-reservation stores.

The legal dispute did not include questions of highway jurisdiction. The truck was stopped on Highway 73 south of Kadoka.

"It was just a mix up. This question has come up before. We weren't trying to sneak beer on the reservation, and the officer was just doing his job," said Tom Helland of the Chamberlain company.

Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1753

In The
Supreme Court of the United States
October Term, 1993

CITY OF TIMBER LAKE, *et al.*,

Petitioners,

v.

CHEYENNE RIVER SIOUX TRIBE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Steven C. Emery
Tribal Attorney General
Mark C. Van Norman
Timothy W. Joranko*
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-2422

* *Counsel of Record*

36 pp

QUESTION PRESENTED

Whether this Court should revisit its ruling in *Rice v. Rehner*, 463 U.S. 713, 715 & n. 1 (1983), that under 18 U.S.C. §§ 1151, 1161, "Congress has delegated authority to the states ***as well as to the Indian tribes*** to regulate the use and distribution of alcoholic beverages in Indian country," even though Congress affirmed that construction within one year after *Rice* by amending § 1161 in other respects without changing its operative language?

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STATUTORY PROVISIONS

18 U.S.C. § 1151. **INDIAN COUNTRY DEFINED.**

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

* * *

PUBLIC LAW NO. 83-277, Ch. 502, 67 Stat. 586, codified in part at 18 U.S.C. § 1161.

An Act to eliminate certain discriminatory legislation against Indians in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1161. Application of Indian liquor laws."

Sec. 2. Title 18, United States Code, is hereby further amended by inserting in chapter 53 thereof immediately after section 1160 a new section, to be designated as section 1161, as follows: "§ 1161. Application of Indian liquor laws.

"The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided that such act or transaction is in conformity

with both the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register.

Sec. 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

Sec. 4. Section 9 of the Act of June 4, 1920, An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes (41 Stat. 751), is hereby repealed.

STATEMENT OF THE CASE

The issue here is whether the Court should revisit its ruling in *Rice v. Rehner*, 463 U.S. 713, 715 (1983) that in 18 U.S.C. §§ 1151 and 1161, "Congress has delegated authority to the states as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." Supreme Court review is unwarranted here, especially since Congress affirmed this Court's ruling in 1984, within one year after *Rice*, by amending § 1161 in other respects without changing the operative language construed by *Rice*.

A. BACKGROUND OF FEDERAL AND TRIBAL LIQUOR REGULATION

In 1986, Congress found that Indian tribal governments need to curb the devastating effects of alcohol abuse among Indians:

> alcoholism and alcohol and substance abuse among Indians is ***the most severe health and social problem facing Indian tribes and Indian people today*** and nothing is more costly to Indian people than the consequences of alcohol and substance abuse measured in physical, mental, social, and economic terms.

Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401 (emphasis added). Congress concluded, "Indian tribes have the primary responsibility for protecting and ensuring the well-being of their members," and directed federal agencies to assist tribes in their fight against alcohol abuse. *Id.*

The Surgeon General and other experts agree with Congress and urge tribal governments to enact proactive policies to curb alcohol abuse:

> Tribes need to strictly examine and change alcohol and social policies so that they influence new norms and guidelines of behavior regarding alcohol and substance use.... [A] new, more explicit set of policies is needed to guide behavior.

SURGEON GENERAL WORKSHOP ON DRUNK DRIVING: BACKGROUND PAPERS (1988) at 219.[1]

Congress has historically shown a strong interest in curbing alcohol abuse among Indians. Since 1834, Congress prohibited ***both***: "(1) the introduction of liquor into Indian country ***and*** (2) the [provision] of liquor ***anywhere in the United States*** [to] an Indian...." Pet.[2] 3; *see Rice* at 722 n. 8. Throughout the Nineteenth Century and the first half of the Twentieth Century, Congress furthered its policy of restricting liquor to Indians through treaty and statutory provisions. "As a condition of entry into the United States, Arizona, New Mexico, and Oklahoma were required by Congress to enact prohibitions against the sale of liquor to Indians and introduction of liquor into Indian country." *Rice* at 723.

After the Korean War, Arizona Indians saw the prohibition against sale of liquor to Indians as discriminatory, and asked their congressional delegation to lift the prohibition. Rep. Patten of Arizona introduced legislation on behalf of Arizona Indian tribes to remove prohibition "within Arizona," "outside

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1. The U.S. Dept. of Health and Human Services Office for Substance Abuse Prevention (OSAP) explains that: "Laws about [alcohol or drug] use have become more strict in response to the waves of AOD-related crimes and tragedies in America. Alcohol or other drugs have been found to be a factor in 50% of traffic fatalities, 62 % of assaults, 49% of murders, 52% of rapes, and 38% of child abuse cases." TURNING AWARENESS INTO ACTION: WHAT YOUR COMMUNITY CAN DO ABOUT DRUG USE IN AMERICA (1991) at 17. OSAP asks the public to check with their local governments to see if new regulations are being considered to fight alcohol abuse and to ensure compliance with regulatory laws by "local retailers, restaurants and entertainment businesses" that sell liquor. *Id.*

2. As used herein, "Pet." refers to the Petition for Writ of Certiorari, "A" refers to the Appendix to the Petition, "O.Ap." refers to respondents' Appendix to Appellants' Memorandum In Opposition To Motion For Stay Of Mandate, and "Tr." refers to transcripts of proceedings before the tribal superior court.

an Indian reservation" and to delegate authority to Indian tribes to regulate the use and distribution of liquor "within an Indian reservation." *See* H.R. 1055, 83rd Cong., 1st Sess.; 99 Cong. Rec. 9959 (July 27, 1953).[3] During hearings on H.R. 1055, other Representatives and the Dept. of Interior agreed to extend its reach to the entire United States, and Congress enacted P.L. 83-277 to make the provisions of the original bill "applicable generally." S. Rep. No. 722, 83rd Cong., 1st Sess. 1 (1953).

Public Law 83-277 provided for a new section, 18 U.S.C. § 1161, which lifted the prohibition against sale of liquor to Indians throughout the United States outside of Indian country, ***and*** affirmatively delegated authority to states and Indian tribes to regulate liquor sales within "Indian country." *See Rice*, 463 U.S. at 715 & n. 1. Public Law 83-277 expressly directed that § 1161 be codified "in chapter 53" of "title 18" after "section 1151." Title 18 U.S.C. § 1151 provides in pertinent part that

> 'Indian country,' as used in this chapter [53], means (a) all lands within the limits of any Indian reservation....

B. TRIBAL COURT PROCEEDINGS.

With the passage of the Indian Alcohol and Substance Abuse Prevention and Treatment Act, the Cheyenne River Sioux Tribe took Congress at its word and declared a war on alcohol abuse in 1987, setting a goal to be alcohol abuse free by the year 2000. In 1988, 150 Indian and non-Indian students petitioned Tribal Council to strictly enforce liquor laws. The Tribe

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3. Congress knew that Indian tribes faced severe problems of alcohol abuse, and viewed its delegation of authority to States and Indian tribes as important to permit local efforts to fight alcohol abuse. Rep. Patten testified, "the largest purchases of Sunmaid Raisins in the Southwest are at Indian trading posts.... and they take that and make raisin jack, some of it highly impure." Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, Report of Proceedings (March 18, 1953) ("House Hearings") at A-69.

requested all reservation liquor dealers to comply with liquor laws voluntarily. Several refused, so the Tribe filed suit.

The Tribe filed civil actions against petitioners in tribal court to enforce CRST Ordinance No. 1 ("Business License"), which requires payment of $100.00 to obtain a general business license, and CRST Ordinance No. 48 ("Alcoholic Beverage Control"), which requires payment of a $150.00 license fee to obtain a liquor license and establishes regulations for the sale of alcohol on the Reservation, including: days and hours of operation; prohibition on sales through "drive-up" windows; prohibition on sales to minors, intoxicated persons, etc.; and revenue measures for alcohol abuse prevention and treatment. Petitioners[4] argued they were exempt from tribal law because their bars and liquor stores were allegedly part of "non-Indian communities" on the Reservation, which, in their view insulates them from reasonable tribal regulation to permit them to sell liquor to tribal members and others with no accountability to the Tribe -- regardless of the admittedly severe damage their liquor sales cause to the Tribe and the Reservation population. The Cheyenne River Sioux Tribe Superior Court found evidence of

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4. Petitioners claim to be "non-Indian owners and operators of liquor establishments" Pet. 7, but this is not so clear. Generally, corporations have no "racial identity" at all. *See Village of Arlington Heights v. Metro. Housing. Dev. Auth.*, 429 U.S. 252, 263 (1977). However, in some circumstances, corporations can be deemed to share the racial or ethnic identities of their membership. *See, e.g., Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-484 (S.D. 1991) (South Dakota state-chartered corporation considered "Indian" for jurisdictional purposes). All of the petitioner municipalities have substantial percentages of Indian residents (from at least 27% to more than 50%), Pet. 9; O.Ap. 89-136, and the Legion Club has Indian members. ***Indeed, Dupree's and the Legion Club's liquor establishments were managed and owned, respectively, by tribal members throughout much of this litigation.*** Only Micki's Lounge is owned by a non-Indian individual, and she ***bought the Lounge she was formerly employed in from a tribal member only four years before this action commenced.***

the so-called "character" of petitioners' communities immaterial under *Rice*.

The superior court held a four-day trial to examine the scope of the Tribe's delegated authority, and to review petitioners' business dealings with tribal members to determine their extent and the effect of their liquor sales on the Tribe and the Reservation population.[5] In regard to petitioners' business dealings, the court found that petitioners:

> 1) "encourage tribal members to patronize their establishments, and ... choose their liquor inventories with a view toward the drinking patterns and preferences of tribal member[s];"
>
> 2) "make from 15 percent to 85 percent of their sales of alcohol to [tribal] members;" and
>
> 3) "draw customers not only from the immediate area in which they are located, but also from communities throughout the reservation, particularly on Sundays, [and] profit from the patronage of [tribal] members."

A-77, A-78. The superior court also found that petitioners all benefit from tribal government services, including police protection and judicial services. For example, tribal police conduct bar checks and routinely patrol near petitioners' establishments, and tribal members arrested at their liquor establishments are tried in tribal court. A-80.

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5. The superior court heard testimony from twenty-three witnesses, including several experts on alcohol abuse: Dr. Terrence Sloan, Director of the United States Indian Health Service Aberdeen Area, Dr. Theo Matheny, Clinical Director of the Cheyenne River IHS Hospital, Dr. Philip May, Director of the Center on Alcohol Abuse, Substance Abuse and Addictions of the University of New Mexico, and Prof. William Wolf, of the Western Behavioral Studies Institute, University of Colorado. The superior court also examined numerous studies on the negative effects of alcohol abuse among Indians, including several specific to Cheyenne River Reservation.

As to the grim effects petitioners' liquor sales have on the Tribe and its members, the court found:

> 1) "Alcohol leads to tremendous early loss of life, dysfunctional families, and high morbidity. Use of alcohol sold by [petitioners] is a causal factor in alcohol related deaths and injuries among tribal members;"
>
> 2) "Use of alcohol sold by [petitioners] has been a causal factor in drunk driving incidents on the reservation and alcohol-related property damage;"
>
> 3) "Child abuse and neglect are serious problems on the reservation and the use of alcohol sold by [petitioners] contributes to these problems."
>
> 4) "Use of alcoholic beverages sold by [petitioners] contributes to [fetal alcohol syndrome] and [fetal alcohol effect] in children of tribal members;"
>
> 5) Unemployment on the Reservation is 60% to 65%. Unemployed tribal members suffer from severe alcohol abuse, "spend their grocery money on alcohol," "sell whatever they have ... to purchase alcohol," and cash welfare checks at petitioners' bars and liquor stores.

A-79, A-83, A-84, A-85. Thus, the court found "problems of alcohol abuse are so pervasive that they threaten the very existence of the tribe" and petitioners "admittedly contribute to these problems." A-82.

These findings had ample support. For example, testimony was introduced from a federal criminal trial for vehicular homicide, where a young man was drinking in Micki's Lounge before killing another tribal member in a car accident. Tr. Exh. 15, *see also* II Tr. 86-90 (tribal member had a car accident on his way home after drinking at the Dupree Bar and was arrested for drunk driving). While the Tribe awaited the Eighth Circuit mandate, another tribal member died in a car accident stemming from liquor sales by Micki's Lounge and Timber Lake Package

Liquor to Indians who were intoxicated before the purchases. The driver, a tribal member, was sentenced for vehicular homicide as a result of his intoxication. *See* O.Ap. 370-381.

Experts recognized the strong correlation between the Tribe's war on alcohol abuse and actual prevention of alcohol abuse on the Reservation. Dr. Sloan noted that drunk driving deaths decreased after the Tribe began its regulatory effort. Prof. Wolf's studies found a 30% drop in high school children at risk for drug and alcohol abuse. At least part of these improvements stems from the Tribe's regulatory efforts. I Tr. 153 (Dr. Sloan), III Tr. 148 (Prof. Wolf). Dr. May explained:

> licensing and various alcohol-related policies ... can ... encourage norms of moderation and control over alcohol and drinking behavior while discouraging ... misuse.

The court found: "Licensing of liquor establishments plays an essential role in any scheme to control the availability of alcohol and regulate its use among tribal members." A-85.

Under its findings, the superior court ruled that the Tribe had delegated authority under 18 U.S.C. §§ 1151, 1161 and authority under both branches of the test for tribal authority set forth in *United States v. Montana*, 450 U.S. 545, 565-565 (1981) (tribal authority extends to persons who enter commercial relations with tribal members and to conduct which affects the tribe's "political integrity, economic security, or health and welfare"), to require petitioners to obtain tribal business and liquor licenses. A-91. The superior court ***enjoined*** petitioners from operating their businesses until they complied with the business and alcohol beverage control laws.[6]

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6. Petitioners applied for and received stays from the superior court based on their agreement to post appeal bonds. Petitioner Micki's Lounge later refused to post the bond and was temporarily closed and had its ($200.00) liquor inventory removed as contraband under court order until the bond was posted. After Micki's Lounge posted a bond, the business was allowed to re-open but it never applied for the return of its "inventory."

A-92. *Cheyenne River Sioux Tribe v. Isabel Package Liquor*, 18 Indian L. Rptr. 6709 (Chy.R.Sx. Sup.Ct. Jan. 8, 1991).

Petitioners appealed to the Tribe's Court of Appeals.[7] Petitioners waived review of the superior court's findings of fact by failing to challenge them in their appellate brief and chose only to contest its rulings of law. The court of appeals agreed with this Court's and the superior court's interpretation of 18 U.S.C. §§ 1151, 1161: Congress has delegated authority over liquor sales to tribes and states throughout Indian country. *Cheyenne River Sioux Tribe v. Dupree American Legion Club*, 19 Indian L. Rptr. 6097 (Chy.R.Sx.Ct.App., Apr. 2, 1992).

Although several petitioners utilize the tribal courts to collect their business debts from tribal members (and continued to do so up to and during the current action), III Tr. 35; O.Ap. 58, 77, 122, 197, they refused to comply with the tribal court's order in this case, so the superior court scheduled a show cause hearing to enforce its order. Just before the hearing, petitioners filed suit in federal district court to enjoin enforcement of the tribal court order.

C. FEDERAL ADMINISTRATIVE ACTIONS

In 1991, the Tribe amended Ordinance 48, "Alcoholic Beverage Control," and submitted it to the Secretary of the Interior for approval and publication in the Federal Register as required by § 1161. Ordinance 48 (1991), like its predecessor, applied throughout the Reservation. The U.S. Department of

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The remaining businesses were not closed "under threat of force" as petitioners state -- except to the extent that a court injunction carries (at some background level) a "threat of force."

7. ***The Tribe's Court of Appeals Justices included former Senator James Abourezk, past Chairman of the United States Senate Committee on Indian Affairs, and Prof. Frank Pommersheim of Univ. of South Dakota School of Law.***

the Interior, Office of the Solicitor undertook a detailed analysis[8] of §§ 1151, 1161 as interpreted by this Court in *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice*, and concluded that the Tribe's delegated authority extends throughout Indian country as defined by § 1151 and the Secretary of the Interior approved and published Ordinance 48 (1991). Petitioners sought no review of that decision. *See* 5 U.S.C. §§ 701-706.

D. FEDERAL COURT PROCEEDINGS.

In federal district court, petitioners alleged they were located in "non-Indian communities" and alleged that their liquor sales did not affect the "health and welfare, economic security, and political integrity" of the Tribe, but did not contest the accuracy of the tribal court findings of fact.

After calendaring and notifying the parties of a hearing, the district court preliminarily enjoined the Tribe without a hearing. The district court made no factual findings but noted:

The Court agrees that [the problems of crime,

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8. Petitioners' statement that the Secretary acted "virtually without analysis," Pet. 7, is belied by the detailed seven-page single-spaced legal analysis applied by the Associate Solicitor to the Tribe's Ordinance 48. Memorandum from the Acting Associate Solicitor, Indian Affairs, April 24, 1992. App. A, Exh. F, Defendants' Motion for Summary Judgment.

Petitioners' claim that the 1991 approval was an "abrupt[] alter[ation]" of Interior's position regarding § 1161 is unsupported by the materials they cite. The 1988 approval, Pet. 6 n. 4, notes that "my certification is not a decision on whether there are exemptions to the tribe's jurisdiction." *Id.* ***The 1951 Solicitor Opinion, which petitioners rely on, Pet. 4-5, dealt only with sales of beer to non-Indians and issued before § 1161 was enacted*** so it is not Interior's position on the § 1161 delegation to states and tribes.

The Secretary acted under congressional direction in approving the Tribe's Ordinance 48. Thus his decision to approve the Tribe's Ordinance 48 is governed by the rules of judicial deference to applicable administrative decision-making outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

> automobile accidents, and fetal alcohol syndrome] exist on the tribe's reservation and that alcohol is a contributing factor.

A-18. The district court "refused to make a decision on the merits of this case," A-19, noting only that petitioners had a "colorable possibility" of success on the merits. A-21. The district court did not interpret §§ 1151 and 1161 or evaluate the "character" of petitioners' communities; suggesting instead that the legal question might be left open because, in the district court's view, *Rice* dealt only with state authority. A-21.

Thus, petitioners present this Court with a record which contains ***only*** the tribal superior court's unchallenged factual findings. Though petitioners had open-ended opportunities to submit written evidence, their only so-called "evidence," Pet. 8-9, is barely more than a handful of two-page affidavits which contain primarily conclusory statements of law with scant admissible factual support[9] -- many of those conclusory assertions were contradicted by petitioners' own admissions during subsequent discovery, which revealed that Isabel, Timber Lake and Dupree, *see supra* n. 9, are substantially "Indian" in character.[10] Indeed, in *Solem v. Bartlett*, 465 U.S. 463, 480

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9. Respondents, on the other hand, answering petitioners' arguments alternatively, filed an anticipated written "summary of evidence" for the district court hearing (which was never held) that, *inter alia*: (1) Dupree's population is mostly Indian; (2) 65% of Dupree's public school children are Indian; (3) Dupree receives city-wide telephone, garbage pick-up, sanitary landfill, and liquid propane gas service from tribal entities and tribal officers provide continual law enforcement services in Dupree; (4) the Tribe's Housing Authority maintains 50 houses for families and 18 elderly housing units in Dupree; and (5) 50% of Dupree American Legion and 85% of Dupree City Package Liquor customers are Indian. See also Tr. Exh. 10.

10. Petitioners' own admissions establish that public schools in Dupree (pop. approx 550), Timber Lake (pop. approx. 800), and Isabel (pop. approx. 400) have "a majority of," 43%, and 28% Indian students respectively. Isabel, with the lowest Indian population of petitioners' communities, Pet. 9, is about 27% Indian, *id.*, contains *two* tribal Housing

(1984), this Court found that, "*it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.*" (emphasis added).[11]

Respondents appealed the preliminary injunction, arguing that § 1161 as interpreted in *Rice, supra* foreclosed petitioners' claims.[12] The Eighth Circuit followed *Rice*, reversed the

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Authority complexes (twenty-nine units), has tribally- and individually-owned trust land within its municipal limits, and receives city-wide telephone service from a tribal corporation. *See, generally*, O.Ap. 227-239. Moreover, the U.S. Census Bureau estimates that its figures on Indian population are about 12% below actual Indian population, and petitioners' own expert admitted that there is at least a 5% to 6% undercount of the Indian population on the Cheyenne River Reservation.

11. Discovery conducted during the pendency of the appeal also confirmed the need to regulate petitioners' liquor selling practices. ***Dupree sells alcohol through a drive-up window***, which is prohibited by tribal law, and Dupree's mayor testified that customers drink in their cars. O.Ap. 325. Dupree admitted that its "practice of selling alcoholic beverages to persons in automobiles makes it more likely that the package liquor store will make sales to intoxicated persons, including Indians . . . because sales personnel do not have the opportunity to observe the customers walking." ***The Legion Club admittedly "sold alcoholic beverages to visibly intoxicated Indians....***" O.Ap. 193. The Legion Club manager, a tribal member, serves Indians that are too intoxicated to continue drinking, o.ap. 331, and her customers have "driven away" intoxicated. Mary Kraft of Timber Lake city package liquor store, knew "***Indian people ... have had their lives ruined [by alcohol] who have purchased liquor from the City Package Liquor.***" O.Ap. 320-321. ***Micki's Lounge sells liquor to pregnant Indian women until they are so intoxicated that they must be "cut off."*** O.Ap. 339-340.

12. Respondents also argued that: (1) the tribal court findings of fact establish tribal authority under *Montana*'s "consensual relations" and "health and welfare" tests; (2) claims against the Tribe *eo nomine* are barred by sovereign immunity; (3) the district court erred in its conception of "irreparable harm" and the "public interest;" (4) the district court erred by taking judicial notice of *untrue* facts; and (5) the district court should have given respondents a hearing to object to petitioners' motion.

preliminary injunction, and ordered dismissal of petitioners' alcohol beverage control and business license ordinance claims. A-10. The court below did not reach the other grounds for reversal. *See supra* n. 12. A-8.

Upon receiving the Eighth Circuit's mandate, petitioners applied for tribal alcohol beverage and business licenses. The business licenses were granted upon application and the alcohol beverage licenses were granted with the understanding that petitioners would cease their sales through drive-up windows, sales to intoxicated people, etc., in accordance with tribal law. Petitioners seek review of the Eighth Circuit's decision on their alcoholic beverage control ordinance claim and drop their attack on the business license ordinance.[13]

SUMMARY OF ARGUMENT

The Eighth Circuit's decision is a wholly unremarkable application of law already settled by this Court. Petitioners argue that *some* conflict "in principle" exists with prior rulings, but the Eighth Circuit based its decision on this Court's ruling in *Rice v. Rehner*, 463 U.S. 713, 715 & n. 1 (1983). In *Rice*, this Court held that under 18 U.S.C. § 1161, "Congress has delegated authority to states as well as to Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." 463 U.S. at 715 & n. 1 (applying § 1151's definition of "Indian country," which includes "all lands within a

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13. Petitioners confine their arguments to alcohol control matters and challenge regulation directed only at the "sale of liquor." Pet. QUESTION PRESENTED. Moreover, this Court and the circuits agree that tribes can require compliance with general business licensing laws such as C.R.S.T. Ord. 1. *South Dakota v. Bourland*, 113 S.Ct. 2309, 2321 (1993) (tribe may regulate non-Indians who "enter consensual relations" with members); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *FMC v. Shoshone Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

reservation").

The *Rice* Court's ruling was correct and required by the express texts of 18 U.S.C. § 1151 and P.L. 83-277 (of which § 1161 is one part) and that construction of "§§ 1151, 1161" is settled law, which the Court has relied on in other cases. So, Supreme Court review is unwarranted in this case, especially since Congress affirmed the *Rice* Court's statutory construction the following year by amending § 1161 without changing its operative statutory language in 1984. *Accord* Pet. 28 n. 18.

Petitioners' argument boils down to the proposition that Congress' delegation of authority in § 1161 is not governed by § 1151's definition of "Indian country" since § 1161 is a mere exemption from federal criminal offenses set forth in §§ 1154 and 1156. This Court already rejected that argument, first in *Mazurie*, and then in *Rice*. Petitioners' peripheral arguments (which curiously rely on statements in briefs in prior cases rather than court opinions) also were rejected in *Rice* or other decisions of this Court and, in many cases, were waived below.

Because the Eighth Circuit decision is based on *Rice*, there is no conflict with any other circuit. Indeed, there has been virtually no litigation concerning tribal authority to regulate liquor sales in Indian country since *Rice*. Here, the Eighth Circuit simply reviewed a prior decision to follow *Rice*. Any purely intra-circuit concern about prior Eighth Circuit case law was resolved when rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT SIMPLY APPLIED *RICE*, AND REJECTED ARGUMENTS REJECTED BY THIS COURT IN *RICE* AND OTHER CASES.

The Eighth Circuit's decision does not conflict with any decision of this Court. Petitioners contend there is a "conflict in principle" with prior rulings, but in fact, the Eighth Circuit's decision was based on law settled by this Court in *Rice, supra*.

A. The *Rice* Court Held: Congress "Delegated Authority To States As Well As To Indian Tribes To Regulate ... Alcoholic Beverages In Indian Country."

In *Rice*, this Court undertook exhaustive analysis of 18 U.S.C. § 1161 and held that:

> Congress has delegated authority to the States ***as well as to the Indian tribes*** to regulate the use and distribution of alcoholic beverages in ***Indian country***.

Rice at 715 (emphasis added). This Court described the delegation's scope by ***quoting § 1151***, "Indian country":

> ***means (a) all land within the limits of any Indian reservation*** ... notwithstanding the issuance of any patent....

Rice at 715 n. 1 (emphasis added).[14] The court below simply followed *Rice,* concluding that "the geographic scope of state and tribal authority extends to a reservation's four corners." *City of Timber Lake, et al. v. Cheyenne River Sioux Tribe, et al.*, 10 F.3d 554, 558 (8th Cir. 1993); A-7.

Petitioners ***now*** argue that the ruling in *Rice* with respect to the delegation to tribes was "dicta" (and not even "considered" dicta). Pet. 21.[15] On the contrary, the *Rice* Court's ruling that

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14. The *Rice* Court meant what it said about the scope of the delegation -- it extends to the reservation boundaries. The *Rice* opinion never mentions the character of Rehner's community nor the title status of her land. Petitioners rely on extra-record material to suggest that there may be no non-Indian communities on the Pala Reservation, as if that mattered, Pet. 20-21, but a map of that area shows that the entire Pala Reservation may be within a non-Indian community -- Escondido, CA!

15. When queried by the court below, petitioners expressly waived the point:

> THE COURT: "By enacting Section 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the State...." Are you saying that's dictum?

Congress delegated authority to tribes was the *ratio decidendi* for finding the same delegation to States:

> Since we found this delegation [to tribes] ... we would ignore the plain language of the statute if we failed to find this same delegation in favor of the States.

463 U.S. at 730. Later opinions confirm that *Rice*'s finding that Congress delegated authority to Indian tribes is a "considered" decision and part of settled law. *See, e.g., National Farmers Union v. Crow Tribe*, 471 U.S. 845, 852 n. 12 (1985) ("in recent years we have decided whether a tribe has the power to regulate the sale of liquor on a reservation. *Rice v. Rehner*").

Indeed, a plurality of this Court since recognized §§ 1151 and 1161 as the very paradigm of congressionally delegated authority in Indian country. In *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989), this Court considered whether the Yakima Indian Nation had authority to zone non-Indian fee patent land in an "open" area of the reservation (immediately outside Yakima, Washington, 1990 pop. 52,827). In its analysis, Justice White's plurality opinion (joined by Rehnquist, C.J., Scalia and Kennedy, JJ.) suggested that absent "express congressional delegation," the Yakima Nation was divested of that general authority. Then, the plurality pointedly distinguished zoning as an area where there is no delegated

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> PETITIONER'S COUNSEL: I'm not saying that's dicta, Your Honor. I don't think we've ever -- well, we may have said that at one point in time; I'm not going to say that.

Tr. of Oral Argument, May 12, 1993 ("Oral Argument") at 21. ***Even in the petition, they admit that § 1151 "was and remains the basic definition of 'Indian country'... applicable to the Pala Reservation in Rice."*** Pet. 20. In P.L. 83-277, Congress enacted a rule of national application, and just as § 1151 applied to the Pala Reservation in *Rice*, it applies to the Cheyenne River Reservation here. Accordingly, the petitioners are left only to complain that the *Rice* Court's holding, with its application of § 1151, cannot be considered authoritative because it was not italicized! Pet. 21.

authority from the paradigmatic express congressional delegations of authority -- liquor and environmental regulation. In those areas, the plurality explained that Congress has "***expressly delegated***" authority to Indian tribes by referring to "18 U.S.C. §§ ***1151, 1161***; 33 U.S.C. § 1377(e) and (h)(1)." (Emphasis added).[16] Thus, the *Brendale* plurality consciously acknowledged the *Rice* Court's reading of §§ 1151 and 1161 as settled law.

B. This Court Already Rejected the Same Arguments Which Petitioners Raise Here in *Rice* and *Mazurie*.

Rice followed from this Court's prior ruling in *Mazurie*, 419 U.S. 544 (1975). *Mazurie* was a federal criminal prosecution for introduction of liquor into Indian country which naturally was governed by the geographic terms in the statute defining the federal criminal offense: 18 U.S.C. § 1154. The *Mazurie* Court emphasized that Congress, by enacting 18 U.S.C. § 1161, had ***both***: ended the distinct federal prohibitions on introduction of liquor and the broader prohibition on sale of liquor to Indians; ***and*** affirmatively delegated authority to Indian tribes to regulate the sale of alcoholic beverages in Indian country. *Mazurie* at 553-556. What is at issue here is Congress' affirmative delegation to tribes under § 1161, not residual federal criminal authority set forth in § 1154.

Petitioners argue that statements from briefs of parties and amici in *Mazurie* show that Congress' delegation of authority to States and Indian tribes is limited by the terms of the criminal offense defined in 18 U.S.C. § 1154(c).[17] This argument is

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16. Despite the *Brendale* plurality's clear reference to "§§ 1151, 1161" as an express delegation of authority to Indian tribes, petitioners have themselves attested to the fatal weakness of their case by misguided reliance on *Brendale* to support a contrary proposition. Pet. at 22 & n. 15, 24-25.

17. If the Court were to look to briefs for authority, arguments in *Rice* are more indicative of civil regulatory authority intended by § 1161. In *Rice*, California told this Court to reject an argument that states' and tribes'

based on their claim that § 1161 "is not an 'express congressional delegation' of power," Pet. at 25, but the claim that § 1161 is a "mere exemption" from criminal liability -- ***which is the sole basis of petitioners' case*** -- was already rejected by this Court:

> Both Rehner and the court below believed that § 1161 was merely an exemption from *federal* criminal liability. ... Our decision in *Mazurie, supra* rejected this argument with respect to Indian tribes.... In *Mazurie* we held that Congress intended to delegate a portion of its authority over liquor transactions on reservations.[18]

Rice, at 730 (emphasis in original) (citation omitted). *Id.* at 734 n. 18 (distinguishing between "the reach of *federal criminal jurisdiction*" and "the scope of state [delegated] jurisdiction" (emphasis in original)).[19]

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delegated authorities varied in checkerboard fashion because this result: "fragments the matter.... It is much more reasonable to conclude that Congress intended joint control by both states and tribes than partial control by each.... Congress was well aware that a comprehensive system was required." Petitioners' Brief on the Merits, *Rice v. Rehner*, No. 82-401 at 58, 65.

18. Indeed, in the portion of its opinion which addresses the delegation to tribes, the *Mazurie* Court identified § 1151 and "Congress' authority to define 'Indian country' so broadly." *Mazurie* at 555. The Court gave special attention to the principles in *Seymour v. Superintendent*, 368 U.S. 351 (1962), which refused to ascribe to Congress an intent to create "an impractical pattern of checkerboard jurisdiction." *Id.*

19. Again in *Rice*, this Court characterized *Mazurie* as holding that Congress intended its own "absolute but not exclusive ***power*** to regulate Indian liquor transactions would be delegated to the tribes themselves." *Rice* at 728 (emphasis added). Of course, Congress' "power" over Indian liquor transactions extends throughout Indian country and is unconnected to any exemptions found in particular criminal statutes.

C. Congress Affirmed *Rice* By Amending § 1161 Without Changing Its Operative Language In 1984.

As petitioners themselves note, it is settled that "when Congress amends certain sections of an Act but leaves others unamended, the prior construction of the statute ***by this Court*** 'which has been left untouched' must be considered" authoritative. Pet. 28 n. 18 (emphasis added) (citing *Reed v. Steamship Yaka*, 373 U.S. 410, 414 (1963) (this principle can outweigh even "the wording of the statute")). Petitioners even concede the application of this rule to § 1161, Pet. 28 n. 18, which Congress amended (while leaving the operative language "untouched") after it was interpreted by this Court. P.L. 98-473, Title II, ch. II, § 223(b), 98 Stat. 2028. Of course, when Congress amended § 1161 in ***1984***, it thereby affirmed this Court's recent construction of the statute in *Rice*, ... (***1983***). (Not, as petitioners would have it, lower court rulings which preceded, and are not consistent with, this Court's ruling in *Rice*.) *After Congress affirms this Court's construction of a statute, further review on the point is plainly unwarranted.*

II. PETITIONERS' INVITATION FOR THE COURT TO REVISIT *RICE* IS FRIVOLOUS: *RICE* WAS SOUND STATUTORY ANALYSIS.

This Court completely analyzed Congress' delegation of authority, 18 U.S.C. §§ 1151, 1161, in *Rice* so further review is not necessary or warranted.

A. Statutory Text Shows That "Indian Country" As Used in § 1161 Is Defined By § 1151.

Petitioners' statutory construction arguments contradict the express language of 18 U.S.C. § 1151 and Pub. L. No. 83-277, one portion of which is codified at § 1161. § 1151 states that:

> Except as otherwise provided in sections 1154 and 1156 of this title, ***the term "Indian country," as used in this chapter***, means (a) all land within the limits of any Indian reservation,... notwithstanding the issuance of

> any patent.... (Emphasis added)

Then, Public Law 83-277 provides, in pertinent part, that:

> Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding ***section 1151 of such title*** the following new item: 1161.... Title 18 ... is hereby further amended by inserting in ***chapter 53*** thereof immediately after section 1160 a new section ... section 1161.... (Emphasis added)

These texts show that Congress understood that it was placing § 1161 in chapter 53,[20] with "Indian country" defined by § 1151. Rep. D'Ewart explained: "***Indian country is defined as within the boundaries of Indian reservations....***" House Hearings, A-24 (emphasis added). This consistent statutory framework is reflected in both §§ 1154 and 1156 (from which petitioners struggle to fashion a narrow delegation), which each restrict their limited, particular definition of "Indian country" for "use[] in this section...." Thus, the court below found that:

> By the express terms of §§ 1154(c), 1156, and 1151, the narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition of § 1151 applies to all other sections in the chapter, like § 1161.

City of Timber Lake, 10 F.3d at 558, A-7.

Indeed, rules of statutory construction also require this result. Where, as in § 1151, there is "an express exception" in a statute, it negates the implication of other exceptions. *See Chicago v. Environmental Defense Fund*, 62 U.S.L.W. 4283

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20. Petitioners simply ignore P.L. 83-277's reference to § 1151 because it undercuts their argument that § 1151 does not apply to the § 1161 delegation of authority.

(May 2, 1994). *See also* 2A SUTHERLAND'S STATUTORY CONSTRUCTION, § 7.11 (1991 ed.) at 165 (express exceptions "comprise[] the only limitation on the operation of the statute and no other exceptions will be implied"). By creating express exceptions to the application of § 1151 for federal criminal offenses, Congress made clear that § 1151's geographic terms defined "Indian country" in ***all other sections in the chapter, including the delegation of authority contained in § 1161***.[21]

Petitioners debate the logic of Congress' statutory framework, Pet. 17-19, but they never question the textual path that led this Court, and then the Eighth Circuit, to conclude that § 1161's delegation of authority in "Indian country" is governed by § 1151's definition.[22] Rather, petitioners complain that the decision below "creates an inexplicable gap" because tribal civil regulatory laws apply where § 1154's federal criminal penalties for "introducing" liquor may not. Pet. 17-19. Yet, there is

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21. Indeed, petitioners' insistence that § 1161's reference to the federal criminal statutes necessarily carries forward their geographic limitations into the delegation of authority in § 1161 would render the reference in § 1161 to "outside Indian country" superfluous because "outside Indian country," there are only fee lands and "non-Indian communities." Thus, petitioners violate the elementary rule that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992).

22. In the face of *Rice* and contrary statutory text, petitioners try to renew "statutory construction" arguments in this Court, Pet. 27-28, but this Court's decisions and the statutory texts are the authoritative determinants of congressional intent. Petitioners' suggestion, Pet. 27, that statutes of the "same subject matter" should be read together is a rule of last resort. *See* 2B SUTHERLANDS' STATUTORY CONSTRUCTION, § 51.01 (1991 ed.) at 118 (rule not normally used "until all other means of determining the intent of the legislature have been exhausted"). Petitioners' other purported "rule," that "specific" provisions govern "general," Pet. 27-28, is used by courts to determine which statute applies to a given factual situation, not to countermand express statutory provisions like § 1151 and P.L. 83-277.

nothing inexplicable about congressional action lifting several distinct statutory prohibitions on sales of liquor to Indians -- which applied without regard to land status[23] -- while delegating to states and Indian tribes meaningful, comprehensive civil regulatory authority throughout § 1151 Indian country. As the Eighth Circuit noted, the texts of Public Law 83-277, §§ 1151, 1154 and 1156 all reflect Congress' intention to do so in neat symmetry and require the conclusion that Public Law 83-277's delegation of authority is governed by § 1151. Thus, since the statutory texts require that result, there is nothing "inexplicable" about the decision below or this Court's holding in *Rice*.

B. The Legislative History Of § 1161 Shows Congress Intended To Delegate Authority to Indian Tribes To Control Liquor Sales Within Their "Reservations."

This Court already undertook an exhaustive analysis of the legislative history of P.L. 83-277 in *Rice*, which shows that Congress meant the geographic scope of its delegation to Indian tribes to include "Indian country" as defined by § 1151.

Public Law 83-277, as originally introduced, covered only Arizona, whose constitution outlawed the sale of liquor to any Indian anywhere in Arizona, without regard to the ownership status of the land. House Hearings at A-4 to A-7.[24] In

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23. For example, the Constitutions of both Arizona and New Mexico were required to include prohibitions on liquor sales to Indians throughout the States, regardless of where that was done. *Rice* at 723. As for the national prohibition on sales to Indians, Felix Cohen told the House Committee that prohibition on the "the sale or giving away of liquor ... to any Indians ... regardless of the place where that is done [is] the most important part of the current discrimination." House Hearings at A-44. *See also Rice* at 722 (total national prohibition against sales to Indians continued until Public Law 83-277); *Id.* at 740 (Blackmun, dissenting) (same).

24. That P.L. 83-277 had its genesis in Arizona, where federally-mandated portions of the state constitution barred all liquor sales to any Indian anywhere in the state, disproves petitioners' suggestion that Congress

committee hearings, Commissioner of Indian Affairs Dillon Myer suggested that the bill be expanded to lift the prohibition on the sale of alcohol to Indians nationally and explained the insertion of references to §§ 1154 and 1156 in P.L. 83-277:

> We are ... in agreement that the statutes relating to intoxicating liquors in Indian country should be eliminated as discriminatory. This bill, unfortunately, does not cover all the statutes, so that our redraft would include these two [§§ 1154 and 1156].

Id. at A-15. Commissioner Myer, however, made no reference to the geographic terms of §§ 1154 and 1156 when discussing H.R. 1055. Rather, Commissioner Myer explained:

> this report is intended to eliminate all of the sections in the statutes which discriminate against Indians ... and at the same time provide opportunity for the *tribes to have prohibition on the reservation* if they wish to....

Id. at A-27 - A-28 (emphasis added). Congress' understanding that it addressed entire reservations was confirmed by Rep. D'Ewart:

> It says, 'shall not apply within any area that is not Indian country.'
>
> You know ***Indian country is defined as within the boundaries of reservations***....

Id. at A-24 (emphasis added). These statements confirm what the statutory texts already show: that Congress,[25] when

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concentrated on a "non-Indian community" exemption when it enacted P.L. 83-277. The "non-Indian community" idea was meaningless in Arizona in 1953 and was not Congress' focus in P.L. 83-277.

25. At one point, petitioners go so far as to assert that the 1953 Congress' "assimilationist" views favor a crabbed reading of tribal authority, statutory language notwithstanding. Pet. 19. This Court long ago rejected that argument. The ***very footnote which petitioners cite*** continues:

enacting P.L. 83-277, intended to delegate regulatory power to states and tribes with respect to Indian country, as generally defined by § 1151 to include entire reservations.

III. PETITIONERS WAIVED ANY CLAIM THAT TRIBAL COURTS CANNOT APPLY TRIBAL LAWS.

Petitioners ***now*** argue that *Mazurie* bars tribal courts from applying tribal liquor laws, Pet. 15, but they never before raised that issue, so it is not before the Court. *E.E.O.C. v. F.L.R.A.*, *supra* at 24; *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 244-245 (1985). As the court below found: "[petitioners] do not assert that any federal law has curtailed the tribe's power to assert [tribal court] jurisdiction." *City of Timber Lake* at 559. A-10.[26] *Cf. Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (failure to allege and prove statutory limit on tribal court jurisdiction bars reconsideration by federal court of issues litigated in tribal court). Petitioners even argued below that the case be ***remanded to tribal court*** to apply their view of § 1161:

> PETITIONERS' COUNSEL: There is no decision of the tribal court deciding whether or not these are non-Indian communities.... [T]hat wouldn't stop the tribe from starting another enforcement proceeding in tribal court, which they certainly could do.... [W]e'd go through the exercise again....

Oral Argument at 20, 27-28. Of course, petitioners have used the tribal courts in the past to redress their grievances, and

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"That Congress intended to facilitate assimilation ... does not necessarily mean that it intended ... to terminate tribal self-government." *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 488 n. 32 (1979); *see Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

26. Petitioners did assert that tribal court jurisdiction over them was barred by ***tribal*** law. The court below rejected this argument and petitioners do not renew it.

continued to do so to collect business debts against tribal members, even while this action was pending in federal court.

Petitioners look for support in *Duro v. Reina*, 495 U.S. 676, 694 (1990). Pet. 15-16. Yet, *Duro* cannot support their claim because that case involved tribal ***criminal*** authority and while this Court noted that §§ 1151 and 1161 did not authorize ***criminal*** prosecution of non-members in tribal court, *id.*, it immediately acknowledged:

> our decisions recognize broader retained tribal powers outside the criminal context. Tribal Courts, for example, resolve civil disputes involving non-members, including non-Indians.

110 S.Ct. at 2061. Statements about tribal criminal authority in *Duro* provide no support for a limitation on tribal civil court authority. *National Farmers Union*, 471 U.S. at 855-856 (distinguishing tribal civil court from criminal court authority).

This Court has held that "[c]ivil jurisdiction over activities of [non-Indians on reservation land] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *Iowa Mutual*, 480 U.S. at 18. Congress, in the Indian Tribal Justice Act, P.L. 103-176, acknowledged that rule. H. Rep. 103-205, 103d Cong. 1st Sess. at 8-9, *reprinted in* 11A U.S.C.C.A.N. (Jan. 1994 Supp.) at 2429. Since petitioners identify no express statutory limit on tribal court jurisdiction, tribal courts possess authority to enforce tribal liquor laws in civil cases.[27]

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27. None of the lower court decisions which petitioners cite contains any limitation on tribes' ability to enforce their ordinances in tribal court. Indeed, petitioners cite *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980), which read *Mazurie* to hold that "[i]t has already been decided that ... the authority of a tribal court can extend over non-Indians insofar as concerns their transactions on a reservation with Indians. *Mazurie* at 557-58."

IV. THE EIGHTH CIRCUIT'S REVIEW OF A PRIOR CIRCUIT DECISION, IN ORDER TO CONFORM TO AN INTERVENING DECISION BY THIS COURT, CREATES NO BASIS FOR CERTIORARI.

No decision from any other circuit (or any state high court) conflicts with the decision below. The clear rule settled by *Rice* in 1983, and affirmed by Congress in 1984, has engendered virtually no litigation. The Eighth Circuit reviewed its prior holding in *Morgan*, *supra* to follow the *Rice* Court's direction, and there have been no decisions in eleven years since *Rice* to suggest that tribal authority over liquor sales is limited within Indian country. Indeed, *Morgan* is the only case since P.L. 83-277's enactment in which any federal court ever found non-Indians exempt from tribal liquor laws. Concerns about *Morgan* are strictly intra-circuit and were resolved by denial of petitioner's request for rehearing *en banc*.

V. PETITIONERS' "LIQUOR TRANSPORT" ARGUMENT IS NOT BEFORE THE COURT.

Petitioners are not liquor transporters and concede that liquor transport is not at issue here: "this litigation only explicitly raises the issue of tribal jurisdiction of non-Indian communities." Pet. 3 n. 1. In fact, petitioners' Complaint includes no reference, and the record contains no evidence, of liquor transport or its actual regulation by respondents. Even the list of highways purportedly within Indian reservations, Pet. 29, is extra-record. Yet, petitioners would still make much of liquor transport -- even referring to it in their "Question Presented." Pet. QUESTION PRESENTED; Pet. 28-30. Even so, they only assert that the decision below "arguably" leads to liquor transport and term the so-called problem only "potential." Pet. 28-29. Clearly, this issue is not ripe for review.

Moreover, petitioners failed to preserve their transport argument for this Court. It first surfaced on petition for rehearing in the court of appeals, which is inadequate to preserve a contention. *Anderson v. Beatrice Foods Co.*, 900

F.2d 388, 396-397 (1st Cir. 1990); *Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Steven C. Emery
Tribal Attorney General
Timothy W. Joranko*
Mark C. Van Norman
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-6686

Brian Koukoutchos
9 Avon Road
Bedford, MA 01730
Of Counsel

* *Counsel of Record*

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Supreme Court of the United States

October Term, 1993

CITY OF TIMBER LAKE, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF ISABEL, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF DUPREE, A SOUTH DAKOTA MUNICIPAL CORPORATION; AMERICAN LEGION CLUB, EDWIN HODGES POST 124, OF DUPREE; MICKI HUTCHINSON, DOING BUSINESS AS MICKI'S CAFE & LOUNGE,

Petitioners,

v.

CHEYENNE RIVER SIOUX TRIBE; GREGG J. BOURLAND, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE; MARVIN LECOMPTE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CHEYENNE RIVER SIOUX TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, FLORIDA, MONTANA, AND UTAH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MARK BARNETT
Attorney General
State of South Dakota
Counsel of Record
JOHN P. GUHIN
Deputy Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

(Additional counsel listed on inside cover.)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

The Honorable Grant Woods
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007-3333

The Honorable Daniel E. Lungren
Attorney General of California
1515 K Street, Suite 511
Sacramento, CA 95814

The Honorable Robert A. Butterworth
Attorney General of Florida
Department of Legal Affairs
The Capitol
PL 01
Tallahassee, FL 32399-1050

The Honorable Joseph P. Mazurek
Attorney General of Montana
Justice Building, 3rd Floor
215 North Sanders
Helena, MT 59620-1401

The Honorable Jan Graham
Attorney General of Utah
State Capitol, Room 236
Salt Lake City, UT 84114

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The states of South Dakota, Arizona, California, Florida, Montana, and Utah, through their respective Attorneys General, respectfully submit a Brief Amici Curiae pursuant to S.Ct.R. 37.2 in support of the Petition for Writ of Certiorari.

INTEREST OF AMICI CURIAE

Each state appearing as amici curiae has one or more Indian reservations within its boundaries. These reservations were created as areas in which tribes and their members would retain exclusive ownership, but various congressional enactments have opened them to nonmember ownership in varying degrees. As a result, "the population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers." *Duro v. Reina*, 495 U.S. 676, 695 (1990).

Litigation in this Court has established that the tribes have little, if any, inherent civil regulatory authority over nonmembers on reservation lands when those lands are not owned by the tribe or its members. *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); and *Montana v. United States*, 450 U.S. 544 (1981). The authority at issue here, however, springs not from inherent tribal power but, in the Court of Appeals' view, from 18 U.S.C. § 1161. This case thus presents a narrow issue of statutory construction over the meaning of the term "Indian country" as used in that provision – i.e., whether the definition of "Indian country" in 18 U.S.C.

§ 1151 or that in 18 U.S.C. §§ 1154(c) and 1156 is incorporated into § 1161. The definition in § 1154(c) excludes from "Indian country" status "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations . . . in the absence of a treaty or statute extending the Indian liquor laws thereto." Section 1156 contains the same substantive definition. No question exists that the individual and associational Petitioners do business on fee-patented lands within "non-Indian communities" and are not otherwise subject to the prohibitions in §§ 1154 and 1156.

Notwithstanding the narrow nature of the question presented, it has practical importance to the sensitive matter of regulating alcohol transport, sale, possession and use within "Indian country." The amici states have identified several locations, other than the Petitioner towns, which are likely "non-Indian communities" under §§ 1154(c) and 1156: McIntosh, South Dakota; McLaughlin, South Dakota; Mahto, South Dakota; Parshall, North Dakota; Solan, North Dakota; Selfridge, North Dakota; Warwick, North Dakota; Polson, Montana; Ronan, Montana; Wolf Point, Montana; Harrah, Washington; Toppenish, Washington; and Wapato, Washington. Moreover, under the Court of Appeals' decision, tribal regulation applies to rights-of-way through Indian reservations. As Petitioners point out, thousands of miles of local, county, state, and federal highways cross reservations and the potential disruption of commerce on those highways is significant. Because the decision below has an immediate and substantial effect within the Eighth Circuit and, in all probability, will lead to controversy

over the scope of tribal regulatory power under § 1161 outside that circuit, review is warranted.

SUMMARY OF ARGUMENT

The Court of Appeals' decision directly conflicts with this Court's decisions in *United States v. Mazurie*, 419 U.S. 544 (1975) and *Rice v. Rehner*, 463 U.S. 713 (1983). The latter decisions interpret the principal "Indian country" liquor statutes, 18 U.S.C. §§ 1154, 1156, and 1161, and establish that Congress did not intend to delegate to tribes regulatory jurisdiction over nonmembers either on fee-patented lands within "non-Indian communities" or on "rights-of-way" running through reservations even if otherwise part of "Indian country" as defined in 18 U.S.C. § 1151.

Mazurie and *Rice* drew their results from and are consistent with relevant legislative history. This history indicates that, in 1949, the definition of "Indian country" appearing in § 1151 was narrowed for liquor law regulation purposes to exclude "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations" from § 1151. *See* 18 U.S.C. §§ 1154(c), 1156. Four years later, 18 U.S.C. § 1161 was enacted. Designed to remove what had come to be regarded as discriminatory treatment toward Indians with respect to liquor transactions, § 1161 provided that federal liquor law prohibitions ordinarily applicable to "Indian country" would not extend to transactions made in conformity with state and tribal law. Because § 1161 was intended to allow

states and tribes the discretion to permit that which federal law otherwise prohibits, it makes no sense to conclude, as the Court of Appeals has, that the term "Indian country" used in that section was intended to have a geographical scope other than the one specified in §§ 1154(c) and 1156 – the statutes whose prohibitions the states and tribes were authorized to negate. Simply put, there was no need to extend to tribes the authority to remove a federal prohibition which did not exist.

ARGUMENT

THE COURT OF APPEALS' MISCONSTRUCTION OF THE TERM "INDIAN COUNTRY" IN 18 U.S.C. § 1161 IS GROUNDED IN A CLEARLY ERRONEOUS READING OF THIS COURT'S DECISION IN *RICE V. REHNER* AND WARRANTS REVIEW.

The Court of Appeals relied largely on footnote 1 in *Rice v. Rehner*, 463 U.S. 713 (1983), for the conclusion that the term "Indian country" in 18 U.S.C. § 1161 refers to the definition given such term in 18 U.S.C. § 1151. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557-558 (8th Cir. 1993). The relevant portion of *Rice*, 463 U.S. at 715 & n.1 reads:

> The question presented by this case is whether the State of California may require a federally licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption. Because we find that Congress has delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian

country,[1] we reverse the judgment of the Court of Appeals for the Ninth Circuit.

---

[1] Title 18 U.S.C. § 1151 defines "Indian country" as "(a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

When viewed with the remainder of the opinion and with the only other application of § 1161 by the Court, *United States v. Mazurie*, 419 U.S. 544 (1975), this brief introductory statement does not bear the weight placed upon it by the Court of Appeals. Both *Mazurie* and *Rice* instead counsel a contrary conclusion.

Mazurie arose from a criminal prosecution under 18 U.S.C. § 1154 of a non-Indian couple for selling liquor at their reservation-located bar. The resident tribes had adopted an ordinance permitting such sales upon appropriate licensure, but the non-Indians had been denied a tribal license. The threshold issue was whether the bar, although within the reservation's boundaries, was situated in "Indian country" as defined in 18 U.S.C. § 1154(c). *Mazurie*, 419 U.S. at 551-52. That issue turned on whether the bar was within a "non-Indian communit[y]," *Mazurie*, 419 U.S. at 549, and this Court agreed with the implicit factual determination that the area involved "did not

comprise a non-Indian community." *Mazurie*, 419 U.S. at 552. The Court accordingly held that the non-Indians were subject to the tribal ordinance:

> Given the nature of the [bars] location and surrounding population, the statute was sufficient to advise the [non-Indians] that their bar was not *excepted* from tribal regulation by virtue of being located in a non-Indian community.

Mazurie, 419 U.S. at 554 (emphasis supplied). The negative corollary to the Court's holding is that the tribe would have lacked the regulatory power later found delegated under § 1161 had the bar been in a "non-Indian communit[y]." Indeed the United States, as petitioner, stressed in its merits brief that the term "Indian country" in § 1161 referred to the modified definition in § 1154(c). Brief for the United States at 7, n.6 ("[t]he exclusion of rights-of-way from the definition allows liquor to be transported through reservations without tribal regulation") & 23 ("[t]he rights of non-Indians within Indian country are protected by 18 U.S.C. § 1154(c), which exempts rights-of-way, and fee patented lands within non-Indian communities, from the liquor prohibition, even though these exemptions may be contrary to the Tribes' wishes"), *United States v. Mazurie*, 419 U.S. 544 (1975) (No. 73-1018).

That tribal regulatory power under § 1161 is geographically coterminous with the scope of the liquor transaction-prohibitions in §§ 1154 and 1156 was made even more apparent in *Rice*. There, the complainant was a tribal member who owned and operated a general store on her reservation. Upon refusal of an application to sell alcohol without a state license, she sought declaratory

and injunctive relief against state officials. Unlike the bar in *Mazurie*, no question existed that the store was located in "Indian country" as defined under §§ 1154(c) and 1156. *See* Respondent's Brief on the Merits at 52 n.9, *Rice v. Rehner*, 463 U.S. 713 (1983) (No. 82-401). This Court's quite general reference to the § 1151 "Indian country" definition footnote 1 was thus understandable since, if within "Indian country" as defined under §§ 1154(c) and 1156, the store was within "Indian country" as defined in § 1151.

What *was* at issue in *Rice* was whether § 1161 delegated federal authority to the States to regulate liquor sales in "Indian country," as that term is used in such provision, by a member of the involved reservation's governing tribe. In finding the requisite congressional authorization, the Court examined § 1161's legislative history at some length. Its review indicated that, "by 1953, federal law curtailing liquor traffic with the Indians came to be 'viewed as discriminatory.' " *Rice*, 463 U.S. at 726. To address the discrimination, Congress settled upon an approach under which the federal prohibition against "Indian country" liquor transactions could be lifted "as long as those transactions conformed both with tribal ordinances and state law." *Rice*, 463 U.S. at 728. Thus, "[b]y enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to *fill the void* that would be created by the absence of the discriminatory federal prohibition." *Rice*, 463 U.S. at 733 (emphasis supplied). Because the discriminatory federal legislation was contained in, most importantly, §§ 1154 and 1156, there is no basis to believe Congress meant the term "Indian country," as used in

§ 1161, to have a geographical scope independent of, or different from, its reach under §§ 1154(c) and 1156 – the statutes to whose discriminatory impact § 1161 was directed.

As in *Rice*, the distinction between "Indian country" under § 1151 and "Indian country" under §§ 1154(c) and 1156 sometimes will have no practical effect with respect to the propriety of a particular liquor transaction. In the Petitioner towns and similarly situated communities throughout the western United States, and on federal, state and local roads through Indian reservations, however, the difference is critical in determining the scope of tribal authority delegated under § 1161. The Court of Appeals clearly has departed from the path marked out in *Mazurie* and *Rice* concerning the meaning of "Indian country" in § 1161, and its decision warrants review to avoid further litigation.

CONCLUSION

The amici states respectfully request the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK BARNETT
Attorney General
State of South Dakota
Counsel of Record
JOHN P. GUHIN
Deputy Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

No. 93-1753

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In The

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

TIMOTHY MICHAEL ENGEL*
MAY, ADAM, GERDES & THOMPSON
P.O. Box 160
Pierre, SD 57501-0160
Telephone: (605) 224-8803

KENNETH E. BARKER
QUINN, EIESLAND, DAY & BARKER
P.O. Box 370
Belle Fourche, SD 57717
Telephone: (605) 892-2743
Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF

ARGUMENT

I. Respondents and the Court of Appeals have Misconstrued 18 U.S.C. §1161.

The essence[1] of Respondents' argument, *see* Brief in Opposition, p. 14, and of the rationale of the Court of Appeals, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557-558 (8th Cir. 1993), is that footnote 1 in *Rice vs. Rehner*, 463 U.S. 713 (1983), establishes that the term "Indian country" in 18 U.S.C. §1161 refers to the all-inclusive definition given that term in 18 U.S.C. §1151. Neither *Rice* nor *United States vs. Mazurie*, 419 U.S. 544 (1975), however, sustain this contention; rather, *Mazurie* and *Rice* both clearly establish that "Indian country," as used in §1161, is limited by the "Indian country" definition contained in 18 U.S.C. §§1154(c) and 1156.[2] Thus, Congress has not "clearly delegated" to Indian tribes regulatory authority over liquor sales in "non-Indian communities."

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[1] Respondents also make other arguments irrelevant to the straightforward legal question presented for review here. For example, Respondents question whether Petitioners are "non-Indians." Petitioners are clearly *not* members of the Tribe. Respondents did not question below whether Petitioners are "non-Indians," and that argument therefore has been waived. *E.E.O.C. vs. Federal Labor Relations Authority*, 476 U.S. 19 (1986).

[2] Respondents attempt to imply that Petitioners have not maintained this argument throughout this litigation, *see* Brief in Opposition at p. 14, n. 15, but the opinion of the Court of Appeals clearly reveals that the argument was raised and considered below. *See, e.g., City of Timber Lake, A-6, A-7.*

In *Mazurie*, this Court indicated that the term "Inidan country", was, in 1949, given a "narrower meaning insofar as relevant to the liquor prohibition, so as to exclude both fee-patented lands within 'non-Indian communities'[3] and rights-of-way through reservations." 419 U.S. at 547. The Court later in the same paragraph states that, in 1953, "Congress passed local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." 419 U.S. at 547. This Court's strong indication, therefore, is that the term "Indian country" was modified in 1949 and that the modification was applicable just four years later in 1953 through 18 U.S.C. §1161.

Rice affirmed *Mazurie's* "understanding" of §1161, *Rice*, 463 U.S. at 729. Both the majority, *Rice*, 463 U.S. at 732, n. 15, and the dissent, *Rice*, 463 U.S. at 741, cite to the very page at which *Mazurie* discusses the evolution of the "Indian country" definition to *exclude* both fee-patented

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[3] Respondents strive to cloud the real legal issue by attempting to create a factual question where none exists. The Court of Appeals did not deem it necessary to consider whether Petitioners are operating in "non-Indian communities," instead assuming that fact for purposes of its decision. Also, Respondents have *stipulated*, for purposes of the preliminary injunction, that at least three of the Petitioners *are* located in "non-Indian communities." See Appellants' Reply Brief, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, No. 93-1148 SDRC at 1-2 (8th Cir. Feb. 26, 1993) ("[Petitioners] correctly note that for purposes of the preliminary injunction only, [Respondents] stipulated that Isabel and Timber Lake are non-Indian communities, contending that this is irrelevant.")

lands within non-Indian communities and rights of way through reservations. *See Mazurie,* 419 U.S. at 547.

Respondents attempt to avoid the import of *Rice* and *Mazurie* by citing the dual purpose of 18 U.S.C. §1161 to end federal prohibitions on the introduction and sale of liquor and the delegation of the authority to Indian tribes to regulate the sale of alcoholic beverages. *See* Brief in Opposition at 16. But what is at stake here is the definition of "Indian country" used in 18 U.S.C. §1161.

The Court in both *Mazurie* and *Rice* has indicated that the term "Indian country" for the purpose of §1161 was limited by 18 U.S.C. §1154(c) to exclude fee lands in non-Indian communities. The Court of Appeals erred in finding to the contrary and Respondents err in making the same argument here.[4]

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[4] Although Respondents attempt to rely upon the actions of the Secretary in approving Tribal Ordinance 48, *see* Brief in Opposition, pp. 8-9, n. 8, they fail to undermine the prior inconsistent arguments of the United States made by the Solicitor General to the Court in *Mazurie*. *See* Petition at 12 and n. 11.

II. Pursuant to *Rice vs. Rehner*, the Tribe has no inherent authority[5] based upon the *Montana* exceptions to regulate liquor establishments.

This Court expressly stated in *Rice vs. Rehner*, 463 U.S. 713, 724 (1983), that "[t]here can be no doubt that Congress has divested the Indians of *any* inherent power to regulate [the liquor trade]." (Emphasis added). Thus, the majority of the Tribe's response deals with factual allegations that are wholly irrelevant to the legal question presented here – whether Congress has expressly delegated authority to Indian tribes to regulate liquor traffic in "non-Indian communities."

Petitioners acknowledge that widespread problems of alcohol abuse exist on numerous reservations, but Petitioners specifically deny making any significant contribution to those problems on the Cheyenne River Indian

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[5] Respondents mistakenly claim that Petitioners have "dropped their attack" on the tribal business license ordinance. In its decision, the Court of Appeals concluded that the delegation of authority it found was broad enough to support both the liquor and business license requirements, and it made no ruling whatsoever on Petitioners'-*Brendale*-based attacks on the business license ordinance. Accordingly, the delegation question presented here, *see* Question Presented, explicitly carries with it a request for review of the enforceability of the business license on the rationale adopted by the Court of Appeals. Upon remand, Petitioners intend to continue with their claim that the business license ordinance is unenforceable as against Petitioners.

Similarly, Petitioners have not waived any claims nor lost standing by applying for tribal liquor and business licenses. Respondents omit the fact that the licenses were applied for "under protest," and that the accompanying transmittals specifically reserved the Petitioners' claims.

Reservation. There are no supportable factual findings by any court that Petitioners' establishments contribute in any significant way to liquor-related problems on the Cheyenne River Reservation. In fact, the *Tribe* has licensed numerous liquor establishments in Eagle Butte, a predominantly "Indian" community and the seat of tribal government. The generalized[6] factual findings of the tribal trial court concerning the Petitioners' specific establishments do not support the Tribe's arguments.

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[6] For example, the tribal trial court found that "15%-85%" of the clientele of the defendants in the tribal court case were Indians. A-78. The tribal trial court was not specific about which establishment had 15%, and which had 85%. In fact, two of the defendants in the tribal court case are not petitioners in this case. A-28.

The two "examples" of testimony allegedly tying Petitioners' establishments to reservation liquor problems are the *only two* instances in the tribal trial transcript where there was a specific relationship identified. For example, the testimony presented was that most persons treated at the IHS Hospital that were diagnosed with alcoholism were from Eagle Butte, a clearly "Indian" community. The police chief testified that his arrest statistics were not broken out by community, and that he had "no idea" where violators purchased their alcohol. *See* Appellees'/Cross-Appellants' Brief, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, No. 93-1148 SDRC at p. 3, n. 2 (8th Cir., Feb. 16, 1993).

Of the two "examples" cited by the Tribe, only one was testimony by a live witness. The other was a transcript of the testimony of the defendant at his own criminal trial, hardly competent or persuasive. Petitioners deny the unsupported allegation concerning their connection to the death of a tribal member pending the appeal.

III. Petitioners have not previously waived any arguments presented to this Court.

The argument made by Petitioners concerning rights-of-way was not waived. Petitioners have never claimed that they are liquor transporters, although it is clear that the Tribe does claim the right to regulate liquor transport on rights-of-way through the reservation. A-112. The argument is intended to show that Congress clearly could not have had the intent attributed to it by the Court of Appeals.

Petitioners do not contend, as Respondents seem to assert, *see* Brief in Opposition at 16-17, that §1161 did not delegate *any* power to tribes. Rather, Petitioners' argument is simply that Congress did not delegate to the tribes any authority over fee lands in non-Indian communities or on rights-of-way. Petition at 11.

Respondents also claim that one of the related supporting arguments, i.e., that the Court of Appeals erred when it found a delegation of authority that allows the Tribe to enforce liquor regulations in the Tribes' *own* courts,[7] is not before this Court because it was not raised

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[7] The statements at oral argument before the Court of Appeals' panel cited by Respondents, Brief in Opposition at 23, are taken out of context. Those statements related to an argument made by Petitioners that the Court of Appeals should affirm the district court decision because the decision of the tribal court was based upon an error of federal law. Transcript of Oral Argument at 19-20. It is also important to note that the quote in Respondents' Brief is paraphrased from statements seven transcripts pages apart. *See* Brief in Opposition at 23.

below. Brief in Opposition at 23; Petition at 15. This argument, however, merely indicates a further mistaken analysis of *Mazurie* and §1161 by the Court of Appeals. Thus, it is properly raised here to question the persuasiveness and legal authority of the decision below.[8]

IV. The only logical construction of §1161 that gives operative effect to every word of the statute is that proposed by Petitioners.

Sections 1154 and 1156 were in place before §1161 was adopted. Section 1161 makes specific reference to §§1154 and 1156, and §1161 is meaningless without those references. Section 1161 does not refer only to certain subsections or sentences of §1154 and 1156; rather, §1151 refers to §§1154 and 1156 in their entirety, including the exceptions for "non-Indian communities" and "rights-of-way."[9]

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[8] Respondents' objections to the refinement of Petitioners' arguments are not, in any case, well taken. *See Bellotti vs. Baird*, 428 U.S. 132, 143, n. 10 (1976) ("Fact that full arguments . . . may not have been asserted . . . does not bar this Court's consideration of the issue.") Petitioners are not raising new defenses or requesting new or different relief.

[9] The argument contained in Footnote 21 of Respondents' brief is disingenuous. Section 1154(a) includes a prohibition on the sale of liquor to Indians *anywhere* in the United States. Section 1161 repealed that prohibition ("Section 1154 . . . shall not apply within any area that is not Indian country . . . "). Section 1161 also *independently* gave to the tribes the authority to repeal prohibition on-reservation (in areas other than non-Indian communities and rights-of-way). The Cheyenne River Sioux Tribe promptly did so in 1953, but didn't assert any jurisdiction over non-trust lands, thus effectively disclaiming

Allowing the decision of the Court of Appeals to stand is sure to engender litigation throughout the country, wherever reservations, non-Indian communities or roads are located. Incidents involving the seizure of transports and their cargo, commercial or private, are likely to increase. See A-132. There has not been more[10] litigation to date because apparently no one anticipated the abrupt change in the law by the Court of Appeals.

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jurisdiction over "non-Indian communities" or rights-of-way. 18 Fed. Reg. 7479 (November 21, 1953).

[10] *See, Berry vs. Arapaho & Shoshone Tribes*, 420 F. Supp. 934 (D. Wyo. 1976), a case within the Ninth Circuit where the "non-Indian community" question was an issue.

CONCLUSION

For all of the reasons set forth in Petitioners' Petition for Writ of Certiorari, and this Reply Brief, Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY M. ENGEL
MAY, ADAM, GERDES & THOMPSON
Counsel of Record
503 South Pierre Street
P. O. Box 160
Pierre, SD 57501-0160
(605) 224-8803

KENNETH E. BARKER
QUINN, EIESLAND, DAY & BARKER
P. O. Box 370
Belle Fourche, SD 57717
(605) 892-2743

Counsel for Petitioners